ANCIENT HINDU JUDICATURE

B. GURU RAJAH RAO, B.A., B.L.

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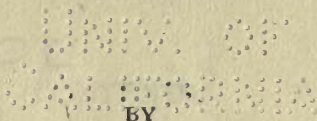
B. GURU RAJAH RAO, B.A., B.L.
District Munsif

FOREWORD BY

SIR JOHN WOODROFFE.

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CONTENTS.

FOREWORD.

LITTLE is, I think, known of the ancient adjective law of India. It is well therefore that an Indian Lawyer should undertake the task of telling us what it was. He has, I think, well fulfilled it within the short compass of this small book.

CALCUTTA,
August 26, 1920.

JOHN WOODROFFE.

ANCIENT HINDU JUDICATURE

CHAPTER I

LAW COURTS AND THEIR CONSTITUTION.

THE paramount duty of the king is the protection of his subjects, which involves the punishment of the wrong-doer. The wrong-doer cannot be found out unless the wrong complained of is ascertained. The Smritis therefore enjoin on the king the duty of enquiring into such (Vyavaharas) (व्यवहार) wrongs himself with the assistance of his councillors.

व्यवहारान्नृपः पश्येत् विद्वद्भिर्ब्राह्मणैः सह ।
धर्मशास्त्रानुसारेण क्रोधलोभ विवर्जितः ॥[1]

The king should with the help of learned Brahmans decide such (Vyavaharas) व्यवहाराः in accordance with the dictates of Smritis, unruffled by temper or uninfluenced by desire.

The law to be administered is the Dharma Sastra subject to local and other usages, which are not inconsistent with the Sastras. The responsibility for the administration of justice rests primarily with the king, though he may seek the help of some learned Brahmans and his minis-

[1] Yagnavalkya, Part II, Chapter I: v. I.

ters in settling the disputes[1]. The king may permanently appoint some learned persons called Sabhyas (सभ्याः) as members of a judicial assembly[2]. They must be well versed in the Vedas, Meemamsa (rules of interpretation), grammar, and the Dharmasastras. They must be lovers of truth and be absolutely impartial. Persons ignorant of the habits and usages of the country or devoid of character were to be avoided.[3] They must be at least 3 in number according to Manu and 5 or 7 according to Brihaspathi. Manu and Yagnavalkya insist on the appointment of learned Brahmans only to such posts while Kathyayana allows the choice of any of the twice born classes possessing the necessary qualifications in the absence of learned Brahmans. These appointed councillors are bound to advise the king properly and to enforce their decision. These were also required to come to an unanimous verdict as far as possible.[4] Besides these, the king may choose some learned Brahmans as *amicus curiæ* to help him with their advice.[5] Their opinion like that of assessors may influence the decision but not control it. The verdict of the appointed councillors like that of

[1] Mitakshara, Bombay Edition, page 107.

[2] Yag. p. II, Ch. I: v. 2.

[3] Brihaspathi.

[4] Kathyayana and Narada.

[5] Kathyayana.

the jury was binding on the king. The appointed councillors were either stipendiary or honorary while the nominated councillors were always honorary. Thus the court presided over by the king consisted of his ministers, his chief priest, and the permanent members of the assembly and the learned Brahmans specially invited for the occasion.[1] The chief priest advised the king in the exercise of his prerogative of mercy and regulated the punishment to be awarded.[2] For the sake of securing the confidence of the people in these tribunals the king may invite to the judicial assembly some respectable and aged merchants of good family and wealth[3]. They were permitted only to witness the proceedings but not to take part in the deliberations.

If the king was unable, owing to his attention being directed to other activities, to take part in the judicial assembly himself, he must appoint a learned Brahman in his place.[4] He was called Pradvivaka प्राड्विवाक (one who hears first both parties and clears up their disputes). He was the chief or president of the assembly. This assembly constituted the highest judicial tribunal next to the court of the king. In course of time two classes of courts

[1] Kathyayana.

[2] Smrithi Chandrika, Mysore Edition. Vy. Kb. page 32.

[3] Kathyayana.

[4] Yag. P. II. Ch. I: v. 3.

came into existence, one class consisting of courts constituted under the authority of the king, and the other class consisting of tribunals constituted by the consent of parties which were therefore in the nature of arbitration courts. Agriculturists, artisans, traders and other labouring classes were permitted to settle disputes concerning their professional interests by tribunals presided over by men of similar calling as they were likely to understand their own disputes better than strangers. This was perhaps the origin of several arbitration courts which sprang up in later times.[1] Besides these stationary tribunals which held their sittings in towns or villages, there were some itinerant courts also. The first class of courts comprised in order of rank:

(1) The chief tribunal presided over by the king himself in the capital of the province or wherever he may sojourn and constituted as above described.

(2) The court presided over by the deputy appointed by the king, called Pradvivaka, and his councillors who formed the judicial assembly. The authority was delegated to them by the king authorizing them in writing or by the handing over of his seal.

[1] Sukra Nithi, Ch. V, s. 5, v. 18.

(3) The assembly of inferior judges appointed by the king and invested with local jurisdiction over small towns or villages.[1]

The second class of Arbitration courts consisted of (1) पूग (Poogha), (2) श्रेणि (Sreni), (3) कुल (Kula) in gradation of rank.[2]

पूग (Poogha) is an association of persons resident in any town or village drawn from various castes and following different professions.

(2) श्रेणि (Sreni) is an assembly of persons of different castes or of one caste following a particular profession, such as a guild of horse-dealers, betel-sellers, weavers, and shoe-makers.

(3) कुल (Kula) is a collection of individuals who are related as agnates or cognates or by marriage.[3] Kula being an assembly of the kinsmen of the parties was the lowest court of arbitration which had to be resorted to in the first instance, as they were far more likely to know all about the dispute much better than strangers. Next above it was the court of the Sreni, which consisted of strangers, but residents of the same locality. Their decision was likely to give better satisfaction to the defeated suitor as tending to remove any taint of partiality

[1] Sm. Ch. p. 41.

[2] Narada and Yag. p. II, Ch 1. v. 30.

[3] Mit. page 130.

which might attach to the decision of the Kula. Highest of these was the Poogha which was perhaps the most cosmopolitan in constitution. The judicial assembly appointed by the king as well as the supreme court of the king in council supervised the work of these arbitration courts.[1]

Both these sets of tribunals had their own ministerial officers also to carry on the work of the courts. They were (1) (गणक) (Ganaka) the accountant who computed the sums due and prepared decrees (Nirnaya Pathra); (2) लेखक (Lekhaka) the scribe who wrote out the pleadings for the parties; (3) the sequestrator who took care of the property seized; (4) साध्यपाल (Sadhyapala) the summoner who enforced the attendance of parties and (5) sometimes the moderator who supervised the entire proceedings and discoursed on morality to the edification of the parties, judges, and the officers of the court.[2] The members of the assembly gave their opinion, the president pronounced his decision, and the king enforced the decree.[3]

Similar in composition were the inferior tribunals in each of the various sub-divisions of the province. According to the Artha

[1] Mit. page 132. [2] Sm. Ch. page 38.
[3] Brihaspathi

Sasthra each province was divided into a Sangrahana, a Kharvatika, a Dhronamukha and a Sthaniya. A Sangrahana was the centre of a group of 10 villages; a Kharvatika of 200 villages; a Dhronamukha of 400 villages; and a Sthaniya of 800 villages. It is surmised that a Sangrahana was the lowest unit of village administration and that 20 Sangrahanas were formed into a sub-division called Kharvatika and that 20 Kharvatikas constituted a district called Dhronamukha, and (Sthaniya) a province consisted of two such districts. In each of these units of administration commencing from the lowest, similar sets of tribunals, each consisting of 3 judges, were constituted for carrying on the administration of justice.[1]

Kautilya's Artha Sasthra describes two classes of courts called धर्मस्थीय and कण्डकशोधन Dharmastheeya and Kantaka Sodhana as prevalent at that time. The Dharmastheeya courts were the regular civil courts which had jurisdiction over the administration of civil and criminal justice, in respect of ordinary matters. The Kantaka Sodhana which consisted of 3 Commissioners (प्रदेष्टारः Pradestaras) seem to have exercised special jurisdiction over matters of commerce and industry and prevention

[1] Mr. Sama Sastry's translation of Artha Sastra, Book III, Ch. I. v. I. Book II Ch. I. v. 163.

of breach of the peace and determination of grave offences against the State. They saw to the enforcement of contracts among artisans and to the regulation of their wages and kept constant vigilance over the detection and prevention of heinous crimes.[1] These tribunals are not referred to in the Manu Smrithi as such courts of exclusive jurisdiction appear to have sprung up later with the further advance of civilisation and consequent spread of commerce and industry. The Manu Smrithi simply refers to some of these disputes as matters for the decision of the king.

Brihaspati divides courts into four classes, *viz.*, (1) moveable courts, (2) stationary courts, (3) courts deriving authority from the king, and (4) courts presided over by the king himself. He mentions 3 kinds of itinerant courts, *viz.*, one in the forests for the benefit of foresters, one among the caravanserai merchants, and one among military men. The court presided over by the king himself may be stationary or moveable. It may be held wherever the king may sojourn. The other courts were all stationary.[2]

According to Bhrighu, there were 15 kinds of courts :—The 3 itinerant courts mentioned

[1] Nagendranath Law's Ancient Hindu Polity, v. I. pages 119 and 120.

[2] Sm. Ch. page 41.

above, (4) the courts presided over by residents of the neighbouring villages in disputes about village matters, (5) a court presided over by persons chosen by both parties among kinsmen, (6) among merchants or (7) among townsmen, (8) courts presided over by villagers, (9) or by townsmen, (10) or by several families, (11) or by guilds, (12) or by persons learned in the four sciences of polity, (13) or by Kulikas, (14) courts appointed by the king, and (15) the supreme court of the king. Excepting the last two, the rest were arbitration tribunals which derived their jurisdiction from the consent of the parties and were formed whenever the parties chose to invoke their aid. Out of these the first five were itinerant courts. These arbitration courts were empowered only to decide but not to carry out their decisions. Their jurisdiction was also ousted in serious cases of crime relating to violence, theft, etc.[1]

The stationary courts were required to be held every day in the morning except on certain Thithies (Chathurdasi, Amavasya, Pournami and Ashtami).[2] The hour of holding the court was fixed at 4 Indian hours after sunrise, making allowance for the time taken for morning ablutions.[3]

[1] Smı. Ch. page 46.

[2] Samvartha.

[3] Brihaspathi and Kathyayana.

The king shall not try any dispute created by himself or by his agents among his subjects.[1] Nor shall he out of any improper motive enquire into any dispute not laid before him by the aggrieved party or his recognised agent.[2] There are however some exceptions to this rule which cover heinous offences against the person or majesty of the king called च्छल (Chala) and certain grave offences against society called अपराध (Aparâdha) and minor offences called पाद (Pâda). These offences were investigated and brought to the notice of the king by hired spies and informers. Except on such information the king could not take cognizance of any complaint on his own motion. Excepting the parties aggrieved or their friends and relatives duly authorized to appear for them, no one else was permitted to appear before the king and file a plaint or complaint.[3]

An action attains finality either upon a verdict given on the pleadings or on oral evidence. The former is called तीरित (Theeritha) while the latter is called अनुशिष्ट (Anusista).[4]

Judgments, the parties to which were either mad or deprived of their senses or afflicted

[1] Pitamaha and Manu.

[2] Manu, Ch. 8 v. 43.

[3] Sm. Ch. page 62.

[4] Narada and Manu ; also Sm. Ch. page 302.

with mental distress at the time of trial or were infants, old people, or dependents upon others, were not binding on them.[1] Also a decision which was on the face of it ambiguous or to which the persons affected thereby were not parties was not conclusive. Judgments passed in respect of persons who could not sue or whose complaints could not be entertained such as enemies of the country and persons exiled by the king had no validity.[2] Excepting under these circumstances a judgment was always conclusive and was not liable to be set aside except by way of पुनर्न्याय (Poonarnyaya) which comprised both review and appeal.

REVIEW.

The decisions of all the courts including the highest could be altered on review by the same courts if there were grounds for doubting its soundness. A verdict given on account of compulsion or fear brought to bear upon the courts could be modified on discovery of such extraneous influence. Decisions in cases of occurrences which took place under suspicious circumstances at nights, or inside a house or outside a village, which showed concealment of the real facts from the courts might be subject to revision.[3]

1 Yag. P. II. Ch. II. v. 32.
2 Manu.
3 Yag. P. II. Ch. II. v. 31.

APPEAL.

In other cases, a party dissatisfied with a decision may appeal against it to the next higher tribunal.[1] In case of success of the appeal the members of the judicial assembly whose decision was upset in appeal were liable to a punishment of fine for their error along with the party who secured from them a wrong verdict in his own favour.[2] The fine was double the amount of the claim. The punishment for corrupt or perverse judgment was twice the amount of fine inflicted on the unsuccessful party.[3] If the wrong decision had been arrived at on false evidence the witnesses alone were punished, provided the party had not been guilty of procuring perjured testimony.[4] No appeal was allowed in cases where a verdict was based on a party's own admissions.[5] Appeals preferred without any grounds to sustain them were punished with similar fines.[6]

In the case of the regularly constituted courts under the authority of the king, appeal lies from the lowest of these to the next higher tribunal up to the highest. Even against

1 Brihaspathi.
2 Narda and Kathyayana.
3 Yag. Part II. Ch I. v. 4.
4 Sm. Ch. page 303.
5 Narada.
6 Narada and Yag. Part II. v. 306.

the decisions of the highest judicial assembly appointed by the king, appeal could be preferred to the king in person, according to Narada, while other Smrithi writers make the decision of the highest judicial assembly final. Appeals are permitted even against the decisions of arbitration courts. Appeal may be taken from the Kula to the Sreni, from the Sreni to the Poogha and finally to the judicial assembly and the king. The king was assisted by a Privy Council which consisted of 12 or 16 members as at the time of the Maurya Dynasty.[1]

A suit once commenced did not terminate with the death of the suitor but could be continued by or against the heirs of the deceased party.[2]

Notes to Chapter I.

1. The composition and constitution of the ancient Indian law courts reveal certain important characteristics which cannot escape notice. In the first place they were all of them in the nature of judicial assemblies or panchayats presided over by several judges and none of them resembled the present Indian tribunals presided over by single judges. It would be interesting study to trace the origin and

[1] Vincent Smith's History of Ancient India, 3rd. Edn., page 140.

[2] Narada and Mitakshara, page 130.

development of the single judge system, if it ever existed in ancient India which the British Government has introduced into all the subordinate courts except the highest, and which seems to be neither indigenous nor to correspond to the British system. Pitamaha distinctly prohibits a single judge trying a cause. He says that a prudent man should not trust a single judge however virtuous he may be and that in every law suit the decision of several persons commands greater respect than that of a single person. The ancient system of judicial administration in India seems to correspond more nearly to the British judicial system consisting of the judge and jury rather than to the present system. The inconvenience of a single judge system is too patent for notice just as the advantages of a judicial assembly are too obvious for mention. The success which apparently attended the ancient system must at any rate encourage those who feel any doubt about the efficacy of the panchayat system in civil disputes and also establish the claim for the extension of the jury system into at least all criminal trials.

2. These ancient judicial assemblies were also sufficiently representative in their character. They included not only men learned in the law but also representatives from the professions and the aristocracy. Such a varied composition

of the assembly gave it an amount of elasticity which is denied to the present law courts with their hidebound rules and forms. They are far more likely to appeal to the imagination of the people and to inspire confidence in them.

3. The differentiation between criminal courts and civil courts was unknown, though the difference between a crime and a civil wrong was not absent from the minds of the ancient law-givers. They recognised the difference but seem to have entrusted the discharge of both the functions to the same tribunal, perhaps in the interests of economy, if not of efficiency as well. In modern times also, such a combination may be trusted to conduce to the same results. Advocates of the separation of judicial and executive functions under the present system of administration in India may find support for it from the ancient system which seems to have worked admirably well. Elaboration of the scheme by which civil and criminal administration may be made to vest in the same tribunals separate from the purely executive functions of the State would be foreign to the scope of this discussion.

4. Besides the regularly constituted courts deriving authority from the king, there was a regular gradation of arbitration courts recognized by the State and resorted to by the

people. They were permanent institutions which worked side by side with the legally-constituted tribunals. Consent of the suitors invested them with jurisdiction, while the State gave legal sanction to their decisions. They were also under the direct supervision of the State and free scope was afforded to the parties dissatisfied with their verdicts to go up to the highest legally constituted tribunal. The observations of Sir Thomas Munro amply bear out the successful working of these institutions even in the early days of the British occupation of India, when the disintegrating forces owing to the misrule of previous centuries had already begun to do their mischief and disrupt village organisations.

It is clear that these village organisations existed in all their purity even during the time of the Chola Kings of Southern India in the 10th century A. D. and contributed to the efficient administration characteristic of that dynasty. They exercised extensive administrative powers also besides judicial functions. Referring to these institutions, Mr. Vincent Smith says at page 464 of his Early History of India, 3rd edition: "It is a pity that this apparently excellent system of Local Self-Government, really popular in origin, should have died out ages ago. Modern governments would be happier if they could command equally effective

agency." The records about Travancore dating even from the 12th century A.D. reveal the successful working of these village committees which tended to control what is now usually called the benevolent autocracy of Native Rulers. Travancore, having been singularly immune from foreign influence for long ages past is often picturesquely described as "a short epitome of Ancient India" and may be taken to represent the actual conditions prevailing in the rest of Ancient India. The authority of Mr. Vincent Smith may again be cited in support of this. He says at p. 459 of his book: "The details of the working of the village associations or assemblies are specially interesting and prove that the Government was by no means a merely centralised autocracy. The village assemblies possessed considerable administrative and judicial powers, exercised under the supervision of crown officials." The achievements of the past justify the demands for the resuscitation of village organizations and foster the hope that under proper State control, village autonomy on healthy and progressive lines may still be developed in India.

5. The ancient law provided also ample remedy for the rectification of the errors of its tribunals. It would have been observed that under the Ancient Hindu Law, a party

dissatisfied with the decision of even the lowest court could seek redress either by way of review or go up on appeal to the protection of the highest tribunal presided over by the king, irrespective of the value of the property or the nature of the claim. Ancient legislation, while recognising the value of unrestricted right of appeal from the lowest to the highest tribunal as an efficient check upon the proper administration of justice, sought at the same time to restrain its abuse. Nothing conduces more to the purity and soundness of administration of justice than the wholesome influence of supervision by the higher tribunals or gives greater satisfaction to a defeated suitor than the concurrence of several tribunals as to the merits of his claim. The ancient law tried to prevent such a valuable privilege degenerating into encouragement of unnecessary litigation, by punishing the unsuccessful appellant while it punished the erring judge as well. The fear of fine restrained the speculative litigant from indulging in the luxury of appeal while the prospect of punishment sharpened the wit of the judge or awakened his dormant conscience. No judge in modern days can of course afford to contemplate with equanimity his position under such a law. The feeling that a judge is always on his trial rather than the case before him is not likely either to let him have a free

hand in dispensing justice or to give him an easy mind thereafter. Though this may have a queer aspect now, the corrective influence of possible punishment in some form or other for manifestly perverse judgments or corrupt verdicts is not to be ignored even in modern days.

6. The ancient law-givers attached considerable importance to the pure and efficient administration of justice as an important function of the sovereign. Manu, while extolling the purity of justice as a divine attribute, apportions the blame for every unjust decision as follows:—One-fourth of the sin goes to the wrong-doer, one-fourth to the untruthful witness who contributed towards such wrong decision, one-fourth to the judges who actually decided, and one-fourth to the king upon whom rests the ultimate responsibility for the entire judicial administration. The king earned the merit of good government and also won the attachment of his people in this world while for his mal-administration he had to pay the penalty in the next. Though the judicial assemblies derived their authority from the king they were sufficiently independent. They were enjoined to decide fearlessly, as otherwise they shared the sin along with the sovereign.

CHAPTER II.

व्यवहार.

(ACTIONS).

A व्यवहार (Vyavahara) or a dispute is defined by Kathyayana as the clearing up of the doubt amidst conflicting statements. He gives the derivative meaning of it as follows :—

वि नानार्थेऽव संदेहे हरणं हार उच्यते ।
नानासंदेह हरणाद्व्यवहार इति स्मृतः ॥

But a more juristic definition is the one given by Vigananeswara in the Mithakshara. According to him a व्यवहार (Vyavahara) is a dispute or a cause of action consequent upon a wrong alleged to have been committed by one on another.

अन्यविरोधेन स्वात्मसंबन्धितयाकथनं व्यवहारः ।[1]

A Vyavahara is begun by any one complaining to the king about any act done to him by another which is opposed to the conduct laid down in the Smrithis.[2] This is the plaint or the complaint as understood now. Each Vyavahara has four stages to pass through.

1. प्रतिज्ञा Prathigna (plaint or complaint). It

[1] Mita., page 107.

[2] Yag., Part II, Ch. I, v. 5.

is also called भाषा and पक्ष Bhasha and Paksha.

2. उत्तर Uthara (written statement).
3. संशयहेतुपरामर्श Samsayahethu Paramarsa (weighing of evidence).
4. निर्णयप्रमाण Nirnaya Pramana (final conclusion)[1].

Vyavahara is of two kinds, शंकाभियोग Sankabhiyoga and तत्वाभियोग Thathvabhiyoga, according to the nature of proof it is susceptible of. शङ्काभियोग Sankabhiyoga is one which has to be determined on circumstantial evidence and probabilities. Thathvabhiyoga is one which can be determined by direct evidence, such as stone or brick which was used for assaulting a man with.[2] Thathvabhiyoga तत्वाभियोग again is of two kinds: प्रतिषेधात्मक Prathishedhathmaka and विध्यात्मक Vidhyathmaka. Prathishedhathmaka प्रतिषेधात्मक is one where the right of another to the property is denied. Vidhyathmaka विध्यात्मक is one where an overt act is done in respect of the person or property of another. The former arises from the denial of a right while the latter originates from the commission of a wrong.[3]

Besides these regular actions, there were

[1] Mitakh., page 109.
[2] Narada, Ch. I, v. 27.
[3] Mitak., page 109.

some accompanied by deposit of money by either party as guarantee of the truth of his claim. These were called सपण व्यवहार (Sapana Vyavahara).[1] Narada classifies them as सोत्तर व्यवहार Sotthara Vyavahara and अनुत्तरव्यवहार (Anutthara Vyavahara).[2] This पण or deposit is to be made before the recording of the plaint. Either party or both may deposit and the deposit so made is forfeited to the king if the depositor fails in establishing his case. The forfeiture so entailed is in addition to the usual penalty inflicted on the unsuccessful suitor. The classification of this kind of actions into सोत्तर व्यवहार and अनुत्तर व्यवहार by Narada is interpreted by some as implying that these demanded better attention at the hands of the king than ordinary disputes.

These disputes together mainly constitute the 18 forms of actions at law specified by Manu.[3] They are :—

1. ऋणादान	recovery of debt
2. निक्षेप	bailment
3. अस्वामिविक्रय	selling property not one's own
4. संभूयसमुत्थान	partnership

[1] Yag., Part II, Ch. II, v. 18.

[2] Narada, Ch. I, v. 4.

[3] Manu, Ch. VIII, v. 4 to 7.

5. दत्तानपकर्म	non-completion of gift by delivery, &c.
6. वेतनादानम्	withholding wages
7. संविद्व्यतिक्रमः	breach of agreement
8. क्रयविक्रय	sale and purchase
9. स्वामिपाल्योःविवादः	dispute between master and herdsmen
10. सीमाविवाद	boundary dispute
11. दण्डपारुष्य	assault
12. वाकपारुष्य	slander
13. स्तेयम्	theft
14. साहसम्	violence
15 स्त्रीसंग्रहणम्	wrongfully taking a woman
16. स्त्रीपुंधर्मः	relation of husband and wife
17. विभागः	inheritance
18. द्यूतसमाह्वयः	gambling

Narada mentions 132 forms of actions which are subsidiary to the above and come under their general classification.[1]

There are four ways of terminating a Vyavahara or dispute. Narada says:

धर्मश्च व्यवहारश्च चरित्रं राजशासनम् ।
चतुष्पाद्व्यवहारोयं उत्तरः पूर्वबाधकः ॥

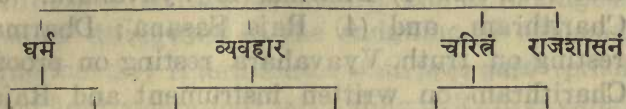
Chapter I, v. 10.

[1] Narada, Ch. I, v. 21 to 25.

They are (1) धर्म abstract justice, (2) व्यवहार decision after contest, (3) चरित्रं written law, local usage, and (4) राजशासनं order of the king. धर्म (Abstract Justice) demands the detection of the wrong-doer and the restitution of property to the rightful owner. The term Vyvahara is in this connection used in the restricted sense of the trial of a suit. Vyavahara helps the attainment of such justice if pursued in accordance with the rules of procedure laid down in the Smrithis. Both are however subservient to the local usage or custom which may terminate the dispute. In the absence of these, the command of the king which is not repugnant to sacred law or natural justice becomes the final word.

Each of these again is sub-divided under two heads: धर्मनिर्णय (Dharma Nirnaya) is of two kinds. Ascertainment of truth after full investigation and close reasoning verified by solemn affirmation is Dharma Nirnaya of the first sort. Adjudication by admission of the adversary or by Divine ordeal is the second kind of Dharma Nirnaya. The verdict given at the conclusion of a trial after production of human proof is Vyavahara of one sort. Verdict given against a party on account of his prevarication or fraud is another kind of Vyavahara. The decision arrived at by inference from the written law is one form of *Charithram* while

that in accordance with local custom is another.

व्यवहार

प्रथम द्वितीय मानुषप्रमाणेन च्छलेन निर्णयं अनुमान देशस्थिति
(युक्ति) (दैवप्रमाणं) तत्वनिर्णयं

The direction of the king is to be sought not only in the absence of any recognized proof but also in other cases of disputes.

Though Narada mentions the four modes of termination of a Vyavahara in the ascending order of merit, still it must be construed in accordance with the rule of Yagnavalkya which gives the foremost place to the ascertainment of truth apart from all technicalities of law. Yagnavalkya says :

च्छलं निरस्य भूतेन व्यवहारान्नयेन्नृपः[1]

The king shall get at the truth of a case avoiding all frauds. Therefore Narada must be understood to say that where the abstract justice and legal procedure conflict—expediency demands precedence being shown to forms of law. In disputes among merchants, caravansary, military men, etc., local usage shall prevail over forms of procedure and dictates of law. Brihaspati also endorses this view. All these ideas

[1] Yag. Part II. Ch. II. v. 19.

are picturesquely described by Narada attributing to justice the form of a human body having four feet, *viz.* (1) Dharma, (2) Vyavahara, (3) Charithram, and (4) Raja Sasana; Dharma resting on truth, Vyavahara resting on proof, Charithram on written instrument and Raja Sasanam on the command of the king. It may employ the four kinds of weapons: Sama साम, Dhana दान, Bheda भेद, Danda दण्ड, *viz.,* conciliation, propitiation, separation, and punishment for achieving its ends. It must conduce to the benefit of the four castes and four orders. The good and evil effects of it extend to four quarters, *viz.*, the parties, witnesses, judges and the king. It has 8 limbs consisting of (1) the king, (2) the chief judge, (3) members of the assembly, (4) sacred law, (5) the scribe and accountant, (6) gold, (7) fire, and (8) water. It has its origin in the three mental qualities of काम, क्रोध, and लोभ, love, hatred, and greed. It has two entrances, *viz.*, (1) the plaint and the reply, and it has two exits, *viz.*, by the truth being eventually ascertained or by the fraud being finally punished[1].

Each Vyvahara so described in general has to pass through four stages: (1) The dispute begins with the भाषा (also called पक्ष or प्रतिज्ञा) when the

[1] Narada Ch. I. v. 11. 12, 26 to 29.

plaint or complaint is laid. (2) The next stage is for the adversary to appear and file his उत्तर Uthara or (written statement). The third stage is called संशयहेतुपरामर्श or the weighing of evidence and fourthly it terminates with निर्णय प्रमाण[1] (proof and final conclusion). According to Kathyayana[2] the third stage is called प्रत्याकलित Prathyakalitha which means the determination of the burden of proof. Each of these will be dealt with separately in the following chapters.

The suits were taken up for trial either in the order of time of institution or according to their importance. The usual order according to institution was varied in cases where injury to the person was serious or the gravity of the wrong was great. Sometimes precedence was shown to suitors of superior castes also.[3] The king should endeavour to dispose of the suits as speedily as possible as delayed justice detracts from its real value and may in some cases lead to actual injustice[4].

Notes to Chapter II.

The action called Saphana Vyavahara (accompanied by deposit of money) referred to in this chapter may look strange as involving a curious

[1] Yag. Part II. Ch. 1. v. 8.

[2] Sm. Ch. page 27.

[3] Sukra Nithi, Ch. IV Sub-Section V. v. 156.

[4] Sukra Nithi, v. 165.

procedure. It must have been contrived as tending to prevent vexatious litigation while it may also indirectly enrich the State coffers. As a source of State revenue, it may appear novel to modern thought while perhaps it may be taken to afford us one more instance of the rapacity of the ancient Hindu kings. But a closer examination will reveal the striking resemblance between it and some forms of disputes recognised by modern law wherein the deposit of the suit amount or costs is insisted on before actual adjudication as proof of the *bona fides* of the claim. The modern system has earned no doubt the merit of generosity in not permitting the forfeiture of the deposit in favour of the State but it cannot claim the credit of having put down vexatious litigation. The additional income which the State derives by avoidable litigation is morally less defensible than the forfeiture of such deposits. It is worthy of consideration whether the adoption of some such principle may not tend to check needless litigation without unduly crippling the State revenue.

CHAPTER III.

INSTITUTION OF ACTIONS—(*Vyavahara*).

GENERAL RULES OF PLEADING.

Filing of the plaint or complaint and the appearance of the adversary :—Vyavahara or action is commenced by the presentation of प्रतिज्ञा (Prathigna) which is plaint or complaint. Ancient Hindu Law made no distinction between civil and criminal courts as having exclusive jurisdiction. The person aggrieved should himself complain in person to the king and not through any agent or any servant of the king. He might however authorize any of his friends or relations to lodge the complaint and the complainant was to be told not to be afraid and was asked to freely give out his grievance. The person against whom the complaint was lodged might be one, two or more. If the complaint was found to be a reasonable one, summons with the seal of the king was issued to the adversary with the direction to come and appear. If the adversary was one against whom such a summons could not be issued, it was withheld[1]. The substance of the complainant's statement was reduced to writing by the scribe

[1] Mitakh. page 110.

of the court on a slate or plank and if the assembly and the learned Brahmans thought after careful consideration his grievance was a real one, either the summons as aforesaid was entrusted to the party or the court summoner was sent to fetch the adversary[1]. The following are the persons who could not be compelled to appear :—

An infirm person, a child, an old man, one who is in an inaccessible place, one who is in misfortune, one who is engaged in study, one who is in a hurry to do any business, one who is distressed in mind, those who are eager to do any business for the king or to celebrate any festival, mad men, drunken men, careless men, men afflicted by misfortune, servants, a young woman who has been newly shorn of her hair, a woman born in a respectable family, a woman who is in confinement, a girl of the highest caste, and noble men of high caste. The dependents of these noble men, women of dissolute character, prostitutes, persons of low families, and outcasts could be summoned to appear[2]. Under exceptional circumstances even they who had been exempted could be compelled to come in conveyances. Ancient Hindu Law knew no distinction between a summons and a warrant.

[1] Yag. Part II. Ch. I. v. 6; Sm. Ch. page 72.

[2] Mita. page 110.

Every writ issued was a warrant. A warrant called आसेध्य (A'sedhya) contained directions as to (1) the place of confinement, (2) limitation of time for appearance, and (3) prohibition against departure from a place, and (4) restriction from doing some particular act. The person summoned should not disobey any of the directions[1]. Whoever disobeyed was punished, as the summons was an order of the king[2]. So also those who procured improper service of summons were punished[3]. Disobedience of summons in the following cases was excused. When access was prevented by floods or impassable forests or sandy tracts or obstructed by robbers or alien army in the way or when one was desirous of marrying or when one was afflicted by disease or grief, or when he was engaged in sacrifice or in king's service, he need not attend: so also minors, messengers, persons tending cattle, or agriculturists watching crops, sculptors actually engaged in work and persons carrying arms in battle were exempt[4]. Persons summoned in one action could not at the same time be made to appear in another action. These persons who could not be compelled to attend might

[1] Narada, Ch. I. v. 48.

[2] Vyasa.

[3] Narada, Ch. I. v. 51.

[4] Narada, Ch. 1. v. 52 to 54.

ask however one of their kinsmen or a friend to appear for them or be allowed to appear after their special avocations were ended or their disabilities were removed. Also one who was not conversant with the litigation or who was engaged in some pursuit might depute a competent person to represent him, whether as plaintiff or defendant. Such right of representation was not however allowed in serious crimes such as murder, theft, adultery, outraging or enticing away a girl, defamation, forgery and generally offences against the State.[1] The agents so deputed were not guilty of appearing for another man's cause, for ordinarily one who had no interest in the litigation could not appear for another[2]. The summoner was called अर्थी Arthi (one who has some object to gain, *i.e.*, plaintiff or complainant) and the summonee was called प्रत्यर्थी (accused or defendant). The Arthi or plaintiff may leave the conduct of his action to his son or grandson, so also the प्रत्यर्थी Prathyarthee (defendant) may depute any one to represent him except in serious cases of crimes or matters of grave importance. Though both parties may thus be represented by their agents,

[1] Sukra Nithi, Ch. 4 Sub. Sec. 5, v. 119 & 120; also Sm. Ch. page 75.

[2] Narada Ch. II v. 23.

still the final decision would bind the actual parties[1]. Such agents were entitled to remuneration at rates varying from $\frac{1}{16}$, $\frac{1}{20}$, $\frac{1}{10}$, $\frac{1}{5}$, up to $\frac{2}{5}$ of the suit amount. In the absence of the remuneration they are entitled to sustenance charges[2].

After the appearance of the adversary in court each party is called upon to find a proper surety for payment of the decretal amount or the fine inflicted by the court[3]. If no surety is forthcoming the party shall pay the daily batta for the peon who keeps him in custody until the actual deposit of the amount claimed[4]. The qualifications of competent sureties are laid down by Kathyayana.

Particulars of the Plaint :—When the प्रत्यर्थि (defendant) appears, the complaint of the अर्थी (plaintiff) must again be taken down in writing in the presence of the प्रत्यर्थि, (defendant) specifying the year, month, and date of the occurrence and also the name, caste and other particulars of both the parties and the nature of the claim in detail. It must be fully recorded in clear, concise, and unambiguous language[5]. What was stated first to set the

[1] Mita. page 112.

[2] Sukra Nithi. Ch. IV Sub. Sec. V. 113.

[3] Yag. Part II Ch. II. V. 10, also Sm. Ch. page 78.

[4] Sm. Ch. p. 78.

[5] Brihaspathi.

law in motion was a brief statement of the case. What was recorded at a later stage was the opening of the case with all its material allegations in full[1]. If the अर्थी Arthi (plaintiff) gives a different version from what he stated before the issue of summons, his action is liable to be dismissed[2]. There are 5 ways in which such a contradictory statement of claim may lead to its rejection. Allegation of a different set of facts altogether, allegation of a different act altogether and improper behaviour before the assembly which casts doubts upon the *bona fides* of the claim result in dismissal of the plaintiff's claim while non-response to or evasion of the summons entails loss of action for the defendant[3].

Besides these particulars which are common to all actions, some which are peculiar to each action must also be specified. They are necessary for the enforcement of the decree and for the restitution of property. Non-specification of such essential particulars entails rejection of the plaint[4]. The specification of the year and month becomes important in actions about debts. The following particulars are required

[1] Mita, page 111.
[2] Yag. Part II. Ch. I. v. 6.
[3] Mita. p. 111.
[4] Sm. Ch. p. 84.

to be given in respect of the immoveable property in dispute :—

(1) The country, (2) the particular place where it is situate, (3) its boundaries, (4) the caste of either party, (5) their names, (6) the person in possession of neighbouring property, (7) its extent, (8) its colloquial or local name, (9) the names of the ancestors of both the parties, and (10) the name of the king by whom it was granted[1].

The abovementioned are the chief characteristics of a good पक्ष Paksha (plaint). There are some which vitiate a Paksha पक्ष (plaint) and make it unacceptable. These may be compared to plaints which disclose no cause of action and are liable to summary rejection. They are :— (1) When it contains a prayer for return of a non-existent thing such as the horn of a hare. But when it is combined with a prayer for other existent things, it is not bad. (2) When complaint is made of a thing about which no reasonable being would complain, for instance, if a man should take it into his head to complain that his neighbour transacts business in his own house with the aid of the light in the complainant's house. (3) When it is not capable of any intelligible meaning. (4) When it has no object to gain, *e.g.*, when the

[1] Sm. Ch. page 83.

complaint is that the neighbour is chanting the Vedas well. This condition is also taken to mean that any form of complaint not falling within the well recognised 18 forms of actions cannot be entertained.[1] (5) When it alleges an impossible thing, for instance, that a man smiled with his eyebrows knit. (6) When it contains inconsistent facts, for instance, that a man was cursed by a dumb man.[2] (7) Where there is no prayer for the restitution of any property or the prevention of any wrong[3]. In addition to these, the claim for a debt barred by limitation(अतीतकाल) of time cannot, according to Narada, be sustained.

Joinder of claims in the plaint :—Joinder of multifarious claims in the पक्ष Paksha (plaint) is bad.[4] Such misjoinder is called अनेकपदसंकीर्ण. (Anekapada Sankeerna). This rule does not prohibit the inclusion of claims of the same kind in one action. An action for theft of gold, cloths, and rupees together, is permissible. Nor is an action for money lent and interest thereon together with a claim for gold entrusted to another, bad. But such claims cannot be combined with actions for the recovery of land unlawfully taken by another.

1 Brihaspathi.
2 Mita. page III.
3 Kathyayana.
4 Kathyayana.

As the acts complained of are different in nature, they cannot be tried simultaneously but they can be tried separately one after another. It is laid down by Kathyayana that a king desirous of finding out the truth should accept a plaint even though it may contain prayers of many kinds which are distinct. Therefore the objection on the ground of अनेकपदसंकीर्ण (An'ekapada Sankeerna) applies only to the various claims being investigated in one and the same action.[1] The rule of Narada which prohibits one from bringing an action against several persons applies only in the case of several distinct claims and not to cases of a single claim against several persons. Notwithstanding these rules above stated, a plaint may be allowed to be amended after being recorded by the court so as to bring it into conformity with the original allegations, but it was directed to be done before the written statement was filed though under special circumstances an amendment was allowed even later.[2]

Persons who cannot sue or be sued :—A drunken man, one who has no consciousness owing to disease or possession of evil spirit, one who is afflicted by disease, one who is in mental distress, a child not capable of understanding, one who is

[1] Mita. page 112.

[2] Sm. Ch. page, 91.

afraid of his enemies, one who is an enemy of the town or country, and one who has been exiled by the king, are incompetent to sue. Also certain actions between persons standing in certain peculiar relationship are prohibited. Instances of such relationship are (1) master and pupil, (2) parent and child, (3) husband and wife, (4) master and servant. Even as between these, some actions are permitted. For instance, according to Gauthama, a master can punish a pupil short of causing his death. In the case of the weak, he can beat with a rope, a bamboo or a twig and in case of others he can beat anywhere on the person. According to Manu, he cannot inflict injury on any of the vital organs of the body. If the master trespasses these limits, he is liable to punishment on the complaint of the pupil. So also in the case of father and son, if the father alienates ancestral property the son can sue the father. A husband is authorised to take and use the property of his wife in times of famine, etc., but if he does so out of greed on other occasions, action will lie against him by the wife.[1] Similarly, forms of action between a slave who receives bare maintenance and his master are laid down. According to Narada, even a slave by birth becomes freed from slavery and he is entitled to

[1] Mita, page 131.

the share of a son if he saves the life of his master. On the infringement of such rights, the master can be sued. Therefore, the object of the rule seems to be that the assembly or the king should discharge such actions by good advice but must entertain them in cases of extreme necessity or pressure justifying interference under the circumstances set forth above.[1] Family women cannot sue as they are dependent on their husbands, but women guards and female vintners who earn their own living can sue. So also servants cannot sue without the permission of their masters.[2] According to Hareetha, one co-owner alone cannot sue in respect of land or money which belongs to several persons in common.[3]

The substance of the statement of अर्थी Arthee should be recorded by प्राड्विवाक Pradvivaka. This पूर्वपक्ष Purva Paksha should be scrutinised before the उत्तर Uthara (written statement) is called for. If the members of the assembly call for the उत्तर Uthara before scrutinising the पक्ष (Paksha) they must be punished by the king and the trial should be commenced again by taking a proper plaint[4].

[1] Mita. p. 132.
[2] Mita. p. 132.
[3] Sm. Ch. page 93.
[4] Mita. p. 112.

उत्तर *Uthara (written statement and its particulars).* After the substance of the recorded plaint has been read over to the प्रत्यर्थी (adversary), his reply to it उत्तर (Uthara) must be taken down in the presence of the अर्थी.[1] (Arthee).

The adversary may be allowed sometime if required in the interests of justice for preparing his defence.[2] It may be granted either at the request of the party or the discretion of the assembly in respect of transactions which took place long ago. It may be extended to a day, 3 days, 5 days, 7 days, and even to a month or 3 fortnights in special cases of old debts.[3] Gauthama allows even a year when witnesses reside in foreign countries or when the adversary is ill. According to Kathyayana, the time allowed must depend upon the circumstance of each case. If he is not ready with his defence within that time, he may be punished with a fine ranging from 3 to 12 *panams* according to Arthasastra[4]. Hareetha suggests corporal punishment and fine if persuasion is of no avail.[5] The granting of time is prohibited in some serious cases such as offences against life

[1] Yag. Part II. Ch. I. v. 7.
[2] Brihaspathi; Sm. Ch. p. 92; Narada, Ch. I. v. 44.
[3] Narada; Sm. Ch. page 95.
[4] Mr. Sama Sastry's Artha Sasthra, Book III, Ch I.
[5] Sm. Ch. page 104.

by use of poison or instrument, theft, insult, and assault, offences against cows, accusations of heinous sins, misappropriation of maintenance amount, charges about the character of women or claims about the ownership of female slaves.[1] Narada includes claims about land and gold in this category. Failure to put in the written statement entitles the other party to a decree.[2] The Uthara उत्तर must (1) traverse the plaint allegations in regular order, (2) must be consistent with logic and reason (न्याय्य), (3) must be a good answer to the claim, and (4) must be couched in such clear language which does not require any interpretation.[3] Therefore any Uthara which does not conform to these conditions cannot be accepted.

The following kinds of उत्तर (Uthara) are defective and therefore bad in law :—

(1) प्रकृतात् अन्यत् संदिग्धः *i.e.*, when a man is sued for the recovery of 100 gold pieces, if the reply be that he is in possession of 10 *panams*, which is quite unconnected with the subject of the claim, it is called an irrelevant defence.

(2) अत्यल्प Athyalpa, *i. e.*, in the same claim if the reply be that he is in possession of only 5 gold pieces, it is called partial defence.

[1] Kathyayana ; Sm. Ch. page 94.

[2] Sm. Ch. page 105.

[3] Prajapathi ; Sm. Ch. page 96. Mita. page 112.

(3) अतिभूरि Athi bhoori, *i.e.*, if the reply be that he is in possession of 200 gold pieces it is an exaggerated defence.

(4) पक्षैकदेशव्यापि When the claim relates to gold and cloths, the reply that he has got gold only and nothing else is another kind of partial defence.

(5) व्यस्तपदं When the claim relates to one matter, reply in respect of some other matter, *i. e.*, when he is sued for 100 gold pieces, reply that he has been beaten by the other is another form of irrelevant defence.

(6) अव्यापि When the claim is in respect of land fully described by boundaries, etc., vague reply that he has taken a land is called evasive defence.

(7) निगूढार्थ or an ambiguous reply is one where in a claim for 100 gold pieces the adversary says (" Do I alone owe," implying thereby that the प्राड्विवाक (presiding judge), other members of the assembly and even his adversary might similarly owe.

(8) आकुलम् or विरुद्धं or inconsistent reply, *i.e.*, when the reply is that he took 100 gold pieces but he has not got them.

(9) व्याख्यागम्यं when the reply is in foreign or unintelligible language.

(10) असारं or defence having no substance, *i.e.*,

in the case of a claim for money lent on interest where the receipt of interest alone is admitted and the claim is made for the principal sum, reply that the interest has been paid but that the principal sum has not been received is called Asar'a (having no substance [1].

A valid Uthara is of four kinds: (1) संप्रतिपत्ति or सत्य Samprathipathi or admission, (2) मिथ्या Mithya or (denial), (3) प्रत्यवस्कन्दनं or कारण Prathyavaskandhana or karana or (confession and avoidance), (4) पूर्वन्याय Poorva Nyaya or (*res judicata*).[2] Again मिथ्योत्तर (denial of claim) is of 4 kinds: (1) Positive denial of the claim, (2) denial of all knowledge of the claim, (3) denial of presence at the particular place, or at the particular time, and (4) denial of birth even at the time alleged.[3] प्रत्यवस्कन्दन Prathyavaskhandhana denotes, in a case of claim for the recovery of goods, either receipt of the goods and return thereof, or an absolute gift. The essence of this Uthara as explained by Narada is that it admits receipt of the goods, money, or other subject of claim but assigns some good reasons for its retention. पूर्वन्याय. Poorvanyaya (*res judicata*) arises where a man

[1] Mita. page 113.

[2] Kathyayana; Mita. page 112.

[3] Kathyayana; Mita. page 112.

sued pleads that he had been sued once before for the same subject-matter by the same person and that it had ended adversely to the opponent. It may be proved either by the written judgment in the previous suit or by the evidence of witnesses or of the judge who decided before.[1]

MISJOINDER OF PLEAS.

The combination of these different kinds of उत्तर Uthara in one and the same action is prohibited.[2] The prohibition is based on the ground that it might otherwise lead to confusion as to the (क्रिया) Kriya or burden of proof. In a single action the burden of proof क्रिया cannot be on both the parties. As there is only one object अर्थसिध्दि to be gained by either, there cannot therefore be क्रिया burden of proof on both. For instance when the Uthara combines मिथ्या and कारण (denial and confession and avoidance) the burden of proof would necessarily fall upon both parties, for it is laid down that in cases of मिथ्या, denial, the क्रिया, burden of proof is on the अर्थी plaintiff, while in the cases of कारण (confession and avoidance) the burden of proof is on the defendant प्रतिवादी. Therefore the combination of the two kinds of burden of proof in one action would be in-

[1] Mita. page 114.

[2] Kathyayana.

consistent.[1] When the claim is for recovery of gold and Rs. 100, the plea that gold was never given and that Rs. 100 had been repaid is not tenable. Similarly the pleas of कारण and पूर्वन्याय (Karana and Poorva Nyaya) cannot be joined together as each of them throws the क्रिया burden of proof on the defendant. As in a single claim either plea is sufficient to non-suit the plaintiff, the other becomes superfluous.

The same considerations prevail when 3 or 4 pleas are combined. The objection as to such misjoinder applies however only when all these pleas are to be heard together but there can be no objection to their being heard one after another, as the अर्थी (Plaintiff) can succeed only if all these are negatived one by one. The order in which they can be heard may depend upon the will of either party or of the members of the assembly subject to the following exception, *viz.*, that the greater of the two pleas प्रभूतार्थविषय (Prabhoothartha Vishaya) or one which leads to the performance of some action in the shape of positive proof or क्रियाविषय (Kriya Vishaya) must first be heard.[2] When कारण (Karana) is combined with another, inasmuch as there is no action to be performed in it, the other pleas must first be heard.[3]

[1] Sm. Ch. page 102.
[2] Hareetha Mita. pages 113, 114.
[3] Sm. Ch. page 104.

Example 1 :—In an action for gold, rupees, and cloths, when the plea is admission about gold, denial about rupees and return of the cloths, the plea of denial must first be investigated as it has प्रभूतार्थ (Prabhoothartha). Then the plea about cloths can come in for adjudication. Similarly, the same rule must be applied when the other pleas are combined with each other.

Example 2 :—In the same action, suppose the plea is "I received gold and rupees. I shall return them ; cloths, I did not receive ; or having received, I returned them. In respect of cloths, the matter is also concluded by previous decision." In this though both the pleas of admission are of the greatest value as terminating the dispute, still inasmuch as no proof has to be adduced about them, the other pleas must first be heard.

Though however in some cases the pleas should appear to be in the nature of a denial and also of confession and avoidance, even then the burden of proof is on the प्रत्यर्थी (Defendant). For instance, when a man claims a cow as his as having been lost since some time, and now found in the possession of his adversary, and the adversary says that the claim is not true and that the cow has been in his possession even prior to the time alleged, and that it is his having been born in his house, such a plea is

proper. It is neither purely a plea of denial nor a plea of confession and avoidance. It partakes of the nature of both. The burden of proof is on the defendant in accordance with the rule that in cases of कारण (Karana) plea, the burden of proof is on the defendant. It might be argued why if this plea is in the nature of a denial the burden of proof is not thrown on the plaintiff. The answer is that it applies to cases of absolute denial and not to qualified denials of this kind as explained by Hareetha.

Where the plea of denial and *res judicata* are combined, then also the burden of proof is on the defendant in accordance with the rule that in cases of plea of *res judicata* the burden of proof is on the defendant. The mere fact of the plea of denial being combined with it does not take away from it the character of the plea of *res judicata* as every plea of *res judicata* implies incidentally the denial of plaintiff's claim also. The rule therefore seems to be that when the plea of denial is casually combined with other pleas which substantially admit the claim, then the burden of proof in all such cases is on the defendant. When the plea of कारण and पूर्वन्याय are combined (when a man pleads he received but returned it and also says it is concluded by former decision), the burden of proof is of course on the defendant in respect of

both the pleas and he can choose the proof of either plea in any order he likes.[1]

After the written statement has been filed, the party on whom the burden of proof lies shall at once note down the evidence which he intends to adduce.[2] Though time may sometimes be granted for filing written statement, noting of the evidence should be done without any delay after the written statement has been filed, to prevent false evidence being got up.[3] Therefore it follows that in cases of pleas of admission there is no necessity for adducing evidence and the trial comes to an end at once.[4] In other cases, the trial has to commence and if either party proves his claim by evidence, oral or documentary, to the satisfaction of the assembly, he succeeds.[5]

Notes to Chapter III.

The minuteness with which these rules of pleading had been framed even in those early days cannot fail to strike a jurist with their astounding similarity to our modern forms of procedure. The rule that the nature of the plaint or complaint should be closely examined

1 Mita. page 115.
2 Yag. Part II. Ch. I. v. 7.
3 Mita, page 115.
4 Hareetha Mita. page 115.
5 Yag. Part II. Ch. I. v. 8.

before the adversary was compelled to appear in court prevented needless harassing out of spite. The rejection of the plaint in such cases resembles the procedure laid down under section 203 of the Code of Criminal Procedure by which frivolous complaints are thrown out, and also the procedure adopted in civil law whereby the plaints showing no cause of action are summarily rejected. The rules laid down for the appearance of the party applied to the attendance of witnesses as well. In respect of the attendance of witnesses, a novel feature of the ancient system was the punishment inflicted for the abuse of the legal process. It is a very common practice now-a-days in Indian Courts for the complainant in a criminal case to include as accused all persons who are likely to give evidence for the defence. In addition to this, very often the female relatives of either party are summoned as witnesses though the feeling of the community is very strong against the appearance of respectable women in courts. This is done either out of spite or out of a desire to coerce the opposite party to come to terms in his desire to avoid social humiliation. Under such circumstances the person summoned is left absolutely helpless, however irrelevant her evidence might turn out to be, or however vexatious such enforced attendance might be felt to be. No doubt the

4

modern law of India having regard to the expediency of enabling suitors to procure the attendance of witnesses without any difficulty has allowed an amount of latitude in civil cases which is sometimes put to improper use. Very often the Indian Courts invoke the aid of inherent jurisdiction to prevent such abuse of process but when the mischief is done without the knowledge of the courts, the courts are not armed with the necessary powers of punishment for using the Courts intended to afford relief as instruments of oppression.

2. The recording of the particulars of the plaint and the written statement in the presence of the opposite party must have had a very salutory effect in preventing reckless allegations. It has a striking resemblance to the examination of the parties in Court before the issues are settled which though prescribed by the Civil Procedure Code of India, is more often neglected by the Indian tribunals than observed. The ancient judicature of India made such examination compulsory.

3. The rules about the misjoinder of pleas in the written statement call for some notice. They seem to have been framed with a view to put a check to all sorts of false defences being set up in respect of the same claim. The modern rule of pleading which while prohibiting the plaintiff from suing on inconsistent

causes of action relaxes it in favour of the defendant seems to err on the side of undue leniency to the defendant. It apparently acts on the principle that to a possible false claim all possible false defences must be left open. The ancient rules permitted the combination of different pleas in respect of various claims but insisted on their being heard one after another. They bear some resemblance to the modern rule which allows multifarious claims to be tried separately.

4. Another noteworthy feature of the judicature in olden days in India was the absence of the professional class of lawyers. The Smritis make no reference to them at all. It would be an interesting subject for research to find out when they first came into existence in India. Sukranithi makes some reference to them. It does not mention them as a professional class who made it a special avocation of their life. They were however required to be well conversant with legal procedure and to be men of good character. They were subject to the disciplinary jurisdiction of the courts also. Any proxy acting contrary to instructions or behaving improperly out of greed was liable to punishment. The party had no unrestricted right of representation in all cases. It was withheld in serious crimes and particularly in offences against the State. Our former Muham-

madan rulers seem to have indented more on the help of these legal proxies as the very term "Vakil" implies. Even the Smrithi Chandrika which is a legal digest composed in the 15th century is silent on this point. The necessity for this body of professional men must have arisen after alien rule began, for the judges who administered the law were foreigners, ignorant of the languages of the country and some middle men were required to assist them in the administration of justice.

CHAPTER IV.

SPECIAL RULES OF PLEADING AND COUNTER CLAIMS.

Counter claims and counter actions.

What has been stated above are the characteristics of actions (Vyavahara) in general. There are certain rules which regulate counter-actions and counter-claims.

The general rule is that when one action has been commenced the प्रत्यर्थी (Defendant) without clearing himself of it, cannot start another action called प्रत्यभियोग (counter-action) against his adversary अर्थी[1]. Though the plea of प्रत्यवस्कन्द or कारण (confession and avoidance) may appear to be in the nature of a counter-claim, inasmuch as it serves to clear oneself of the charge brought, it is not a separate counter-action. The prohibition is in respect of a different counter-action unconnected with the previous one. An obvious exception to the rule of प्रत्यभियोग (counter-action) arises in cases of wrongs affecting person, such as quarrels with or without the use of force, insults, and serious crimes endangering life by the use of poison, weapon, etc.[2] Under

[1] Yag. Part II, Ch. II. v. 9.

[2] Yag. Part II. Ch. II. v. 10.

these circumstances, a counter-complaint can be laid. Though this counter-complaint is not really an answer to the original charge but is an independent and separate charge newly started, still it is permitted, as it would go either in mitigation or enhancement of the punishment for the original charge.[1] In determining such disputes, it is laid down that the aggressor is the more guilty of the two. When both start the quarrel or beat each other simultaneously they shall receive equal punishment.[2] प्रत्यभियोग (counter-action) is permitted in such cases, as serving some useful purpose whereas in others it does not. In other cases it leads only to needless embarrassment at the trial and puts the adversary to unnecessary annoyance. Consequently it is also laid down that when one action has been commenced and the trial of it has not ended, no other action shall be started at the same time against the same person.

Variance in pleadings:—As a lesser form of counter-action the variation of the pleadings is also prohibited. It is not open to an अर्थी (plaintiff) to allege at the time of recording the भाषा (Bhasha) a different set of circumstances from what has been alleged at the time of आवेदन

1 Mita. page 117.

2 Narada, Ch. XV. v. 9 and 10.

(Āvédana). It has been already laid down that the substance of the भाषा should correspond with what is contained in the आवेदन Āvedana. Thus there should be not only the identity of the subject-matter of the claim but also the identity of the allegations in respect of the same subject-matter.[1]

Example:—A man having alleged that he had lent Rs. 100 with interest and that it had not been repaid at the time of आवेदन (Āvedana) cannot at the time of भाषा Bhasha say that he had lent 100 cloths with interest. Nor can he say at the time of Bhasha that the adversary had robbed him of Rs. 100 while he had alleged before that he had lent Rs. 100 with interest and that the adversary had refused to return it[2]. Non-observance of such directions does not lead to the dismissal of the pleas raised but must be met with punishment. For it is the duty of the king to find out the truth of a Vyavahara avoiding all attempts at deception. Such variance in pleadings however may entail dismissal of the claim in matters of dispute arising out of passion or temper (such as assaults, etc.) but not in matters relating to rights to property or women in which case the person guilty of it may only

[1] Mita. p. 116 and Narada, Ch. II. v. 24 and Sm. Ch. p. 105 and 106.

[2] Mita. page 116.

be punished[1]. But if such variation occurs in the latter case after the filing of the written statement the claim itself is liable to be dismissed.

Example :—If an अर्थी (complainant) having stated at the time of आवेदन Avedhana that he was kicked on his head by प्रत्यर्थी (Defendant) with his foot says at the time of Bhasha he was either kicked with foot or beaten by hand, not only is he liable to punishment but also his action is liable to be dismissed.

Notes to Chapter IV.

The rules about counter-claims and counter-actions were framed with a view to prevent the needless harassing of a party by vexatious counter-cases and frivolous counter-claims. This was a distinct step in advance of modern legislation. Another mode by which the tendency to pursue frivolous and vexatious litigation was checked was by punishment of the unsuccessful party as will be shown in Chapter X. The modern Indian Legislature has thought fit to restrict it to criminal actions. Extension of this rule to manifestly false and vexatious civil claims would be a wholesome innovation consistent with ancient Smrithis, in the administration of civil justice as tending to diminish needless litigation. The modern rule of punishment

[1] Mita. page 117; Narada, Ch. II v. 25.

by the awarding of costs to the successful party is found by experience in many cases to be inadequate reparation for the annoyance undergone and the expense actually incurred in the course of a protracted litigation. The ancient Hindu legislators while anxious to check litigation recognised equally well that the strict application of these rules of pleading should not entail failure of substantial justice, and laid down as a general rule that it was the duty of the king to find out the truth in spite of the technicalities of the law and procedure and the dishonest attempts of suitors to take shelter under them. The rule that the question of variance between pleading and proof is one of substance and not of form is as old as the Smrithis. The amendment of the pleadings was permitted in important cases relating to property or women with the necessary safeguard of punishment for such alteration. The punishment was apparently in the nature of a fine which corresponds to the present award of costs.

CHAPTER V.

PRINCIPLES OF PROOF प्रमाण PRAMANA.

After the filing of the written statement the judicial assembly determined on whom the burden of proof lay. In accordance with that decision the party called upon to prove his case, adduced his proof (Pramana प्रमाण). No proof was admitted which was not tendered openly in the presence of both parties.[1] No necessity was apparently felt for the procedure now adopted of framing issues in the case as the courts were required to confine their attention to the trial of only one particular claim at a time. Proof प्रमाण is of two kinds, *viz.*, (1) मानुषिक Human, (2) दैविक Divine. Human proof is furnished by (1) Documents लिखित, (2) Witnesses साक्षि, (3) Enjoyment भुक्ति[2]. Divine proof is usually of 5 kinds besides some others. (1) Ordeal by Balance घट Ghata, (2) by fire अग्नि Agni, (3) by water उदक Udaka, (4) by poison विष visha, (5) by drinking water कोश kosa.

There are certain rules which regulate the mode of proof applicable in certain cases. Divine proof is to be resorted to only

1 Sukra Neethi Ch. IV. Sub-Sec. v. 166.

2 Yag. Part II Ch. II. v. 22.

in the absence of human proof. Where of the two litigants one adduces human proof and the other divine, the human proof must be accepted in preference to the other.[1] Where also a portion of the claim only is proved by available human proof, the rest cannot be proved by divine proof. In such a case by reason of the rule that proof of a part amounts to proof of the whole, the whole claim must be held proved.

Example:—Where a man has witnesses only to prove payment of money in the case of a loan and offers to prove the amount lent as well as the rate of interest by divine proof, the divine proof is not permissible[2]. The rule that साहस (Sāhasa) offences committed secretly can be proved by divine proof, applies only in the absence of human proof. The rule of Narada admitting divine proof in cases of साहस committed in uninhabited forest, or at night, or in the interior of a house or of cases of breach of trust must be understood similarly. The general rule which admits divine proof only in the absence of human proof is subject to the following exceptions. According to Katyayana, in actions for (साहस and पारुष्य) violence and defamation, divine proof is the only kind of proof

[1] Kathyayana and Mita. p. 123.

[2] Kathyayana and Mita. p. 123.

possible for determining the criminal act.[1] Subject to these rules, in pleas of denial, and confession and avoidance, either form of proof may be adduced. But the plea of *res judicata* is susceptible only of human proof and it does not admit of divine proof[2]. Some Smrithi writers like Brihaspati, Katyayana, and Pitamaha altogether prohibit resort to divine proof in disputes about immoveable property and in cases of minor insult[3]. But divine proof may generally be had in cases where the evidence (oral or documentary) is highly suspicious and the matter in dispute is involved in great doubt[4].

Even among the forms of human proof documentary proof or proof of enjoyment alone is acceptable in some cases in preference to the rest. In respect of transactions carried on by any corporate body, guilds, or associations, documentary proof alone is valid and not any other human proof even to the exclusion of oral evidence[5]. Oral evidence is considered legitimate proof in preference to documents and divine proof in the case of disputes about payment of wages between master and servant, and about non-payment of purchase-money, and in cases of

[1] Mita. pp. 123 and 124.

[2] Sm. Ch. p. 120.

[3] Sm. Ch. page 121.

[4] Brihaspathi ; Kathayayana, Sm. Ch. p. 121.

[5] Sm. Ch. p. 122.

disputes about gambling. In actions regarding the right of passage through a door or way, or in actions regarding flow of water or enjoyment of water rights, proof by enjoyment alone is preferable to any other proof[1]. Katayayana says that in all disputes about immoveable property either documentary evidence or evidence of enjoyment plays a greater part than mere oral evidence as tending to clear up disputes. As between the documentary evidence and the evidence of enjoyment, the latter has greater weight[2].

Title with possession :—भुक्ति Bhukthi (enjoyment) comes therefore foremost as a mode of proof in respect of rights to immoveable property generally. As possession is an incident of ownership it is recognised as a mode of proof of ownership. Hareetha describes title as the root and possession as the branch of a tree. Mere possession, however, is not proof of ownership. It is legal title आगम Āgama, such as is acquired by gift, purchase, etc., that really confers ownership. Such title has greater validity than mere possession in determining ownership.[3] According to Yagnavalkya title however perfect if unaccompanied by even slight

[1] Mita. page 124.

[2] Narada, Ch. IV. v. 77.

[3] Narada Ch. IV. v. 85 and 86.

possession is of no value.[1] Possession is insisted on by Katyayana and Brihaspati also for completing the legal title as affording some guarantee of the reality of the title deeds. Katyayana says that undisturbed possession for 10 years under a document to the knowledge of the former owner places the document beyond all doubt. Enjoyment of even one of the several properties comprised in a document raises a presumption of enjoyment of the rest.[2] Even if there be legal title evidenced by a document in one man and if he allows enjoyment of the property by another, the owner runs the risk of losing his property, his legal title being of not much avail to him in course of time. Therefore some slight possession is enjoined in token of ownership. But mere possession for however long a time does not confer ownership as a usurper cannot become owner by the fact of possession.[3] Therefore possession, in order that it may afford proof of ownership must satisfy five conditions:—(1) it must be accompanied by title, (2) it must be long, (3) it must be without interruption, (4) it must be without obstruction, (5) it must be to the knowledge of the adversary.[4] But in cases of mere enjoyment

[1] Yag. Part II Ch. II v. 27.

[2] Brihaspathi: Sm. Ch. page 154.

[3] Narada Ch. IV. v. 87.

[4] Mita. page 128; Sm. Ch. page 160.

from generation to generation it is valid proof of ownership by itself though unaccompanied by proof of title, as such long possession raises the presumption of legal title. This exception applies only in cases of enjoyment for a period lasting beyond the memory of man or for 3 generations, which may be taken to exceed the period of man's memory.

Ordinarily one hundred years is considered to be the period of a man's memory, being the period of his life. The validity of possession based upon title has reference to enjoyment for a period less than one hundred years. In this case, as it is possible to determine whether possession is based upon title or not, possession accompanied by title is recognised as a mode of proof. In the case of immemorial enjoyment or for over 3 generations it is not possible to trace the existence or otherwise of title as the origin of possession, and therefore mere possession is recognised as a mode of proof.[1] If there is no memory of enjoyment from generation to generation by right, even though it may be for over 100 years, mere possession is of no avail, as it is laid down that a person enjoying without title though for hundreds of years is liable to punishment as a thief. The conclusion arrived at by the

[1] Kathyayana Mita. page 123; Sm. Ch. page 163.

Smirithi writers is that possession having a lawful origin alone is valid for proving ownership. In course of time it proves ownership. Conversely mere title without possession cannot prove ownership as want of possession may indicate subsequent transfer of ownership.[1] This is summed up as follows by Yagnavalkya :

आगमोऽप्यधिको भोगाद्विना पूर्वक्रमागतात् ।
आगमोपि बलंनैव भुक्तिः स्तोकापि यत्नो ॥

Pitamaha says :—

नागमेन विनाभुक्तिः नागमो भुक्तिवर्जितः
तयोरन्योन्य सबंधात् प्रमाणत्वं व्यवास्थितम्.

Title without possession :—Title however perfect is held by Yagnavalkya not to be complete without even slight possession. This rule is interpreted by Vigneswara as insisting upon the importance of delivery not only for divesting one of ownership but also for the purpose of transferring ownership to another. The transfer of ownership is effected only by acceptance of delivery. Acceptance may be of 3 kinds: (1) mental, (2) oral, (3) physical. Mental acceptance मानसिक takes place where the transferee wills that the property shall be his. Oral acceptance वाचिक is done by means of declaration in unmistakable language that the property has become his own. Physical accept-

[1] Mita. page 129.

ance कायिक is signified by various modes such as actual receiving or touch, etc. Rules have been laid down indicating the various modes of physical acceptance. Deer, cow, and kid must be accepted by holding the tail; elephant by holding its trunk; horse by holding its manes; and a female slave by touching her head. According to Āsvalāyana, living things must be accepted by uttering some sacred hymns or auspicious words and by touch in the case of inanimate objects and girls. In the case of moveables. all the 3 kinds of acceptance are possible. But in the case of immoveable property physical acceptance is impossible unless it be by enjoyment of its usufruct. Therefore the rule says that mere title created by sale or gift without even slight enjoyment so as to indicate acceptance of ownership is not complete and cannot prevail as against title accompanied by such enjoyment. This rule operates also to determine priority between two conflicting titles the dates of which are not known, in which case, the one with possession prevails over the other without possession. If the dates are known, the one prior in date ought to prevail even though devoid of possession.[1]

This rule is also understood by Vigneswara

[1] **Mita.** page 129.

as determining the relative merits of the 3 kinds of human proof in certain cases. When the title of the original owner has been proved by witnesses, it ought to prevail over mere present possession except in the case of inherited property. In the case, however, of inherited property, the fact of inheritance from generation to generation is of greater evidentiary value than proof furnished by documents or by third parties. In the case of titles with and without possession, the one with possession is of greater validity than the one without possession[1].

Prescription and limitation : From these discussions we are naturally led to the cases of enjoyment adversely to the real owner. In respect of such enjoyment the following rule is laid down by Yagnavalkya :—

पश्यतोऽब्रुवतो भूमेर्हानिर्विंशति वार्षिकी ।
परेण भुज्यमाना या धनस्य दशवार्षिकी ॥[2]

If a stranger is allowed to enjoy the land of another to the knowledge of the owner and without obstruction for 20 years, it becomes lost to the owner ; if it is moveable property, it is lost after enjoyment for 10 years. Vignaneswara struggles hard to establish that this is

[1] Mita. page 129.
[2] Yag., Part II. Ch. II. v. 24.

neither a rule of limitation nor a rule of prescription. It does not stand to reason, says Vignaneswara, that the ownership in the property itself should be lost after enjoyment for the prescribed period, as mere non-obstruction is not recognised by law or usage as a mode of transfer of ownership, just as a gift or a sale. Nor can mere enjoyment for 20 years confer ownership as mere enjoyment is no proof of ownership just as ownership does not necessarily connote enjoyment. Also mere enjoyment is nowhere laid down as a mode of acquisition of ownership. For according to Gautama, there are only 8 modes of acquiring ownership: (1) inheritance, (2) purchase, (3) partition, (4) seizure, (5) finding, (6) gift to a Brahmana, (7) conquest for a Kshatriya and (8) acquisition of wages by Vaisya and Sudra. Narada enumerates only six, *viz.*, (1) right by birth or the finding of treasure, (2) gift, (3) purchase, (4) conquest or valour, (5) marriage, (6) inheritance. Brihaspathi makes it 7 by adding gains of learning and mortgage to the list and omitting gift.[1] Mortgage becomes a source of acquisition of ownership by the rule of foreclosure. The rule of Yagnavalkya cannot be taken to lay down enjoyment as a mode of acquisition of ownership, as the circumstances under which

[1] Sm. Ch. page 161.

ownership is acquired are well recognised in the world and as his single authority cannot be considered sufficient to create a new one. Gautama's saying cannot be taken to be merely illustrative as it is meant to lay down the modes of acquisition of ownership. Further as it is laid down that the sinner who enjoys a property without being entitled thereto shall be punished like a thief, this negatives enjoyment being a mode of acquiring ownership. This saying about enjoyment without title cannot be explained away as applying to enjoyment without the knowledge of the owner. For Katyayana lays it down as a rule that a person who has unlawfully taken the cattle, women and slaves of another cannot rely upon his enjoyment to perfect his title and that it applies to his son as well. Therefore he argues that this rule of Yagnavalkya does not prescribe loss of ownership.[1]

Nor does it operate, he says, as a bar to any action in respect thereof. For according to Narada, an action for the recovery of the property after enjoyment by another for a prescribed period, fails, if the owner has been negligent in asserting his right or has kept quiet over the enjoyment by the other.[2] So even according to

[1] Mita., page 125.

[2] Narada, Ch. IV. v. 76.

Narada enjoyment on account of neglect defeats the claim but does not destroy the right to property. Similar is the view of Manu. A person who enjoys the property of another who is not an idiot or a child, is entitled to retain it as the action by the latter for recovery of the same would fail.[1] It would thus be seen that the view of Vignanesvara that the rule of Yagnavalkya is neither one of limitation nor of prescription is opposed to the clear texts of Narada and Manu and his attempt to explain away these texts is altogether unsuccessful. Brihaspathi lays down that the real owner who allows his property to be dealt with by another as owner or enjoyed adversely to his knowledge cannot recover it afterwards though his legal title is unimpeachable. Vyasa prescribes the period of such enjoyment destroying the legal right to property to be 20 years which is also the period fixed by Yagnavalkya for immoveable property. It must be observed that while Narada merely lays down a rule of limitation Manu makes the right extinct with the remedy. Therefore these texts unmistakably establish a rule of limitation and thereby incidentally also a rule of extinctive or restrictive prescription. This inference receives support from the various texts including the text of Yagnavalkya (Verse 25) which

[1] Manu, Ch. VIII. v. 143.

illustrate the cases of permissive possession and exclude them from the operation of extinctive prescription. While Yagnavalkya fixes the period of limitation at 10 years for moveable property, Marichi limits it to 5 years. There is a text of Marichi cited in the Smrithi Chandrika to the effect that cattle, conveyances, ornaments, things taken with consent are liable to return within 5 years and that otherwise they are lost to the owner. Manu also says that things enjoyed with the consent of the owner such as cows, horses, camels and bullocks left for being tamed always continue to be the property of the owner.[1] Things enjoyed with the consent of the owner either by learned Brahmanas, kings, agents or by friends and relations are never lost to the owner by such enjoyment. These texts clearly indicate that permissive possession neither clothes the possessor with ownership nor detracts from the right of the real owner.[2]

Besides these cases of permissive possession where permission is express, there are others of implied permission where possession cannot be construed to the detriment of the owner as being adverse. Manu and Yagnavalkya exclude boundary marks, property kept in pledge, sealed deposit or bailment, property of minors,

[1] Manu, Ch. VIII. v. 146.

[2] Mita., p. 126 & Sm. Ch. p. 157.

women, property of the king, and of the learned Brahmanas from the category of those liable to possessory ownership.[1] Enjoyment by one's own relations agnate or cognate may also be traced to the implied consent of the owner. Katyayana adds to this list the property of idols, as the latter are not capable of asserting their right and preventing hostile enjoyment. This has some resemblance to the modern law by which trust property is in some cases held to be outside the operation of the law of limitation. According to Narada, a student engaged in study, or a merchant resident in a foreign country, may claim his property after return home within 12 or even 50 years.[2]

Adverse enjoyment during the period of imprisonment of a person does not count against him. These rules seem to lay down the law of extinctive or restrictive prescription, though some Smriti writers have construed them as indicating that the owner runs the risk of losing his property in consequence of enjoyment by another for the prescribed period, thereby some cloud being cast upon his title and the probative value of documentary and oral evidence being weakened by such adverse enjoyment. These rules may also be under-

[1] Manu, Ch. VIII. v. 149. Yag. Part II. Ch. II. v. 25.
[2] Sm. Ch. p. 58.

stood as laying down that until the prescribed period, the owner runs the risk of losing his property, while after the expiry of the period, the apprehended risk becomes an established loss. Vignaneswara's explanation of the text of Yagnavalkya as referring to the loss of produce during the period of such adverse enjoyment is far-fetched and unsupported by any other authority. Vignaneswara himself recognises in a way acquisitive prescription in respect of moveables. This rule of Yagnavalkya seems therefore to indicate a rule of limitation and of prescription in accordance with the views of Manu, Narada, and Marichi above referred to. The rule that the usurper never becomes owner though the latter is deprived of his property accords with the modern rule that limitation may extinguish the remedy but not the right. Narada and Hareetha invest enjoyment for 3 generations with legal ownership though the original possession was adverse and unlawful. Yagnavalkya adopts the rule of Manu cited above excluding some properties from the effect of such adverse enjoyment as an exception to his rule and this clearly bears out the interpretation put upon it as a rule of limitation and prescription. As a matter of fact this interpretation of Yagnavalkya's text has been accepted by some of the Bengal Jurists like Raghunandhana and Jagannath Tarka Panchanana.

Length of possession: It has been stated above that lawful possession ripening into legal ownership must be of long duration. Brihaspati says it cannot be for less than 35 years, which is the period of one generation. According to Vyasa it is 20 years. But both classify the enjoyment according to the number of generations covering the period of enjoyment and value it in the ascending order. If the enjoyment exceeds 3 generations it is called immemorial enjoyment. The first usurper has therefore to prove his title and possession as against the adversary who claims the property though in the case of his sons and grandsons possession alone may suffice to deduce title.[1] Immemorial enjoyment or enjoyment for 3 generations raises a presumption of legal origin and dispenses with proof of legal title as stated already. Both Hareetha and Narada go the length of saying that such enjoyment for 3 generations though unlawful should not be disturbed.[2]

Proof of possession: Possession is best proved by the oral evidence of the actual cultivators of the land, of the villagers, or of the neighbouring land-owners, or by documents.

[1] Sm. Ch. page 165.

[2] Mita, pages 129 and 130; Sm. Ch. page 168.

[3] Narada and Sm. Ch. pages 153 and 162.

This takes us to the subjects of oral and documentary evidence.

Notes to Chapter V.

1. Immemorial enjoyment raising a presumption of legal origion under ancient Hindu law seems to have a close resemblance to the presumption of lost grant raised in the English law. It would have been observed that the ancient Smritis insisted on the legal origin of possession as indicative of ownership and did not recognize unlawful possession for however long a time ripening into legal title. Ancient Hindu Legislature nurtured in an atmosphere of exacting morality and high spirituality could not reconcile itself to the immoral position of raising long unlawful possession to the pedestal of legal ownership. Under Ancient Hindu Law a mere trespasser could never hope to clothe himself with legal ownership however long his adverse possession might have been, unless he had a fair title as well. So strong is this moral consciousness of Vignanesvara and some Smriti writers that they would not accept even what appears to be the view of Yagnavalkya that prescriptive enjoyment may bar the remedy but not take away the right. The modern law of prescription cannot be supported on any ethical basis but is founded on the principle of expediency. On a comparison of

the Ancient Hindu Law with the laws of other countries, Dr. Markby says in his "Elements of Law" 3rd edition, page 290: "The objection to the English Law is, that it does not take sufficient notice of the distinction between a holding by wrong and a holding under a defective title but gives the same fixed period of prescription for nearly all cases."

2. The properties of women, idols, and of the State were preserved with scrupulous care under the ancient Hindu Law. Any length of enjoyment of such properties neither vested ownership in the possessor nor deprived the real owners of the right of recovering them. The property of minors and idols was thus kept outside the scope of limitation and prescription as in modern law.

3. The rule which insisted on delivery of possession as completing legal title was a wholesome check on the execution of sham and colorable documents which have unfortunately become a very common feature of Indian litigation in recent times. Benami transactions or sham documents were foreign to the ancient law of India. The idea of a benami transaction was a foreign importation made perhaps after the Muhammadan conquest. Those who have any experience of the Indian Courts will readily recognize the enormous amount of mischief which the benami transactions are creating in

India by promoting needless litigation. An eminent Indian Judge of the High Court of Madras has characterised it as demoralizing litigation in this country. The support given to it by the English Judges administering the Indian law on the supposed analogy of legal and equitable estates familiar to the English Lawyers is due to the ignorance of the real spirit of ancient Hindu Law and perhaps also due to a pardonable desire to give effect to what they, though erroneously, consider to be the prevailing sentiment of the people. The British Judicial system in India was unfortunately obliged to give its legal sanction to these transactions which were in vogue among the people of this country though it is opposed to the spirit of British jurisprudence. These benami transactions while tending towards general demoralization of the people seem to exercise a very depressing effect upon trade. The complaint very often made that indigenous trade in this country does not attract capital by way of investment may be traced to some extent to the habits of the people who indulge in benami transactions. The Indian legislature has already interfered in discountenancing benami purchases through Court. It is high time that this restriction is extended generally to all benami transactions.

CHAPTER VI.

ORAL EVIDENCE.

The second method of human proof is by the testimony of witnesses.

Witnesses and their characteristics: A witness is a person other than the party who has some knowledge of the transaction in dispute.[1] A person becomes a witness according to Manu either because he has seen something or heard something.[2] Witnesses are of two kinds:—(1) कृत Krita (chosen); (2) अकृत Akrita (casual). Krita witnesses are of 5 kinds and Akrita witnesses are of 6 kinds, according to Narada.[3]

The Krita witnesses are (1) लिखित Likhita (one who has been purposely brought to attest a written instrument). If he is a signatory he is called a लिखित Likhita or one who can write his name himself. If not he is called लेखित Lekita (marksman) or one who gets his name written by others.[4] (2) स्मारित Smarita, is one who has been asked to

[1] Sukra Neethi, Ch. IV. Sub-section V. v. 182.

[2] Manu, Ch. VIII v. 74.

[3] Narada, Ch. IV. v. 149.

[4] Hareetha.

witness a transaction and reminded about it every time the transaction takes place. (3) यदृच्छागत Yadhrichchagata, is one who has casually come at the time of the transaction. (4) गूढसाक्षि Goodha Sakshi is one who has been asked by the plaintiff to hide himself in some place and to listen to the words of the adversary. (5) उत्तरसाक्षि Uttara Sakshi is one who, having listened to the statement of a person who is about to die or to travel abroad, about some disputed transaction, is called upon to speak to it.[1]

The Akrita witnesses are :—

1. The villagers, 2. Judge, 3. King, 4. one who has been authorised to do any act, 5. the person deputed by the plaintiff, 6. members of the family in matters affecting the family. Judge includes the clerk of the Court and the members of the assembly.[2]

The credibility of each of these Krita witnesses excepting those who have attested documents is gauged by a time limit according to Hareetha. Witnesses to a document may be believed after any lapse of time. Smarita witnesses cannot be believed after 8 years; Yadhrichchagata witnesses after 5 years; Goodha witnesses after 3 years; and Uttara witnesses after the expiry of one year. This

[1] Brihaspathi and Sm., Ch. page 184.

[2] Narada, Ch. IV. v. 150 to 152.

rule however seems to be merely directory without being mandatory as he adds that generally the testimony of a person is dependent upon his mental capacity and power of memory and that so long as these remain unimpaired his testimony may be accepted even after any length of time[1].

Among Akrita witnesses the villagers become necessary witnesses in cases of murder or theft occurring in a village or in boundary disputes arising therein. The Judge as well as the members of the judicial assembly and the clerk of the Court may be required to prove previous decisions in pleas of *res judicata*. The king, himself though ordinarily exempt, may be obliged to give evidence about any matter coming to his notice in the course of an enquiry. A person who has been by consent of both parties deputed to do a certain act out of confidence in him or the person who is employed as the common agent of both is equally eligible as an Akrita witness[2]. In partition disputes and disputes about loans, members of the family of both parties who are actuated by Dharma and are impartial may be chosen as witnesses[3].

Number and quality of the witnesses :—Ordinarily there must be at least 3 witnesses

[1] Sm. Ch. page 185.

[2] Sm. Ch. page 175.

[3] Hareetha and Sm. Ch. p. 186.

who have good understanding, perform penance, who are generous, born of good family, lovers of truth, who are guided by the principles of Dharma, who are straightforward, who bear no hate or ill-will, who have sons, who are wealthy, and who perform the duties enjoined by the Vedas and Smritis[1]. Even one or two persons well versed in Dharma may be competent witnesses on consent of both parties[2]. Two witnesses may suffice out of Likhita and Goodha witnesses described above[3]. In the case of actions relating to adultery, theft, insult and violence, any person may be a competent witness if he is not affected by defect of character and if his evidence is not vitiated by previous contradiction. Preferably witnesses of the same caste or order as that to which the parties belong should be examined[4]. Women witnesses should be preferred where women are concerned[5]. In disputes between merchants, other merchants or the members of a guild should be chosen[6]. In the absence of these, others may be examined provided they are free from any of the grounds of incompetency.

1 Yag. Part II. Ch. V. v. 68 and 69.

2 Yag. Part II. Ch. V. v. 72 ; Narada Ch. IV. v. 192.

3 Sm. Ch. p. 174.

4 Narada, Ch. IV. v. 154.

5 Manu, Ch. VIII. v. 68.

6 Narada, Ch. IV. v. 155.

Grounds of incompetency.—The following are the five main grounds of incompetency arising from

(1) वचन (Vachana) written authority.
(2) दोष (Dosha) defect of mind or character.
(3) भेद (Bheda) contradictory statements.
(4) स्वयमुक्ति (Swayamukti) volunteering to give evidence.

(5) मृतान्तर Mritantara (The witness who becomes ineligible after the death of either party, who had chosen him as a witness or on account of the non-existence of the thing for which he was cited)[1].

According to written authority a person engaged in the performance of Vedic rites, one who follows Vanaprasthasrama and a wandering ascetic are not to be cited as witnesses. The king also is exempt from giving evidence. Artists and sculptors are not competent witnesses on account of their natural inclinations towards acquiring wealth and of being swayed by pecuniary considerations[2].

The defect of mind affecting the capacity of a person to observe clearly, to understand properly, and to express correctly,

[1] Narada, Ch. IV. v. 157 to 162 and Sm. Ch. p. 187.
[2] Sm. Ch. p. 178.

excludes some persons from the category of competent witnesses. Women, aged persons over 80 years, and infants below 16 years of age, are incompetent witnesses. Similarly persons in mental distress afflicted with any disease such as leprosy, drunken and mad persons, and persons who are defective in any organ of sense are not competent to give evidence. Defect of character may arise out of interest or bias towards either party. Persons having interest in the subject matter of the dispute, the friends and relations and dependants of either party, and enemies of either party should be avoided as their evidence would bear obvious bias. Men of avowedly bad character such as sons quarelling with their fathers, thieves, chandalas, outcastes, persons of brutal instincts, men of bad temper, persons addicted to gambling, deceitful persons, men accused of heinous sins or crimes, and proved perjurers and forgers should be excluded[1]. Narada specifies in detail persons following various professions and others as undesirable witnesses[2]. However, in the absence of qualified witnesses any one who is not a friend or enemy of either party may be examined[3].

[1] Yag] Part II. Ch. 5, v. 70 and 71; Manu Ch. 8, v. 63 to 68.

[2] Narada Ch. IV, v. 182 to 186.

[3] Narada Ch. IV, v. 190; Sm. Ch. page 181.

The rules as to competency of witnesses have necessarily to be relaxed in the case of offences of violence, etc., or in respect of acts done inside a house or a forest and in cases of danger to life. Narada would shut out even in such cases the evidence of children, women, relations and perjurers and forgers. He excludes them on the supposition that children are usually devoid of understanding, women are habitually prone to lying, and relations are always inclined to partiality, and that others indulging in forgery and perjury are by practice always deceitful[1]. If however these disqualifications appear in a minor degree their evidence also may be received though with some caution in cases of offences of violence, etc.

A Mritantara witness was one who had been cited by a plaintiff or defendant as a witness to any transaction and who was subsequently rendered ineligible either on account of the non-existence of the subject-matter of the dispute or on account of the death of the party who had cited him as a witness. This was done either at the time of death or on other occasions. These witnesses however became competent when the suit was allowed to be continued by the sons or grandsons of either party. In cases of bailment and debts due to

[1] Narada Ch. IV, v. 189 to 192.

the deceased, these witnesses became competent when disputes about them cropped up[1].

The rules for the appreciation of evidence are laid down below. The testimony of witnesses at variance with their own previous statements or with those of other more credible witnesses cannot be accepted. It is in this sense they are regarded as incompetent.

The party citing a particular witness is alone entitled to examine him. His relations or others authorized on his behalf may also examine such a witness. A witness cited by one person but examined by another person is guilty of volunteering evidence.[2] A person not cited or summoned but offering to give evidence is a voluntary witness liable to punishment irrespective of the truth or falsity of his evidence.[3]

Production of oral evidence.—The attendance of the witnesses was secured very much in the same manner as the appearance of the adversary related in Chapter III. Some of the rules applicable for the compulsory appearance of the parties applied to the witnesses as well. The witnesses summoned were paid their fee called Purushabhriti

[1] Mita. page 152 and Sm. Ch. page 158.

[2] Katyayana and Sm. Ch. page 189.

[3] Sukra Neethi, Ch. IV Sub-Section V v. 196.

(पुरुषभृति) and also their travelling expenses in proportion to the suit amount not exceeding $\frac{1}{8}$ of the amount. The amount so spent by the party was recorded and eventually recovered from the defeated suitor.[1]

The competency of each witness was first decided before his examination was commenced. As in the case of documentary evidence, obvious defects of mind or character in respect of the witness tendered were noticed by the Chief Judge or the members of the assembly, it being left to the opposite party to bring out the latent defects.[2] As in the case of documentary proof, so also in the case of oral testimony all objections about the competency of witnesses were to be pointed out before the conclusion of the trial itself. Any later discovery did not vitiate the decision. Nor could the soundness of the judgment be impeached by subsequent attacks directed as to the quality of the oral evidence adduced but not detected before.[3] This prohibition applied to the competency as well as the credibility of the witness. The witness was questioned as to his competency or character and his answers were recorded. Any reckless attempt at discrediting a witness

[1] Mr. Shama Sastry's Translation of Artha Sastra, Book II. Ch. I. page 190.

[2] Sm. Ch. page 191.

[3] Brihaspati and Katyayana, Sm. Ch. page 192.

was punished with the same penalty inflicted on a false witness.[1] The discredited witnesses were discarded and the trial proceeded with the examination of other witnesses if any. If no other proof be forthcoming, the party tendering such evidence which had been rejected shall be deemed to have failed to substantiate his case.[2]

Mode of recording evidence.—After such preliminary examination, the witnesses who have been summoned and are present shall be questioned in the presence of both parties after having been told the consequences of untruth[3]. According to Katyayana, the Pradvivaka shall question the witnesses one by one after having sworn them that they shall speak the truth in the presence of Gods and Brahmans.[4] The method of swearing is prescribed by Manu. In the case of a Brahman, he shall be told that his merit of truthfulness shall perish if he speaks falsehood. In the case of a Kshtriya he shall be told that his vehicles and weapons shall become ineffectual if he should swerve from truth. A Vysya was told that his cattle and seed-grain would become devoid of fertility, and a Sudra was made to invoke all kinds of sin if he should speak

[1] Brihaspati.

[2] Mita., page 153 and Sm. Ch. page 193 and 194.

[3] Manu, Ch. VIII v. 79.

[4] Yag., Part II. Ch. II v. 73 to 75.

falsehood.[1] If a Brahmana or any one of the three higher classes follows any of the following professions, *viz.*, tending cattle, trade, singing, service under any person, and usury, he shall be treated as a Sudra for the purposes of swearing.[2] Sudra witnesses shall be told that if they speak untruth the sins called पातक, उपपातक and महापातक Pataka, Upapataka and Mahapataka shall descend on them, that the worlds which await those who set fire, or kill women and children, shall receive them, and that, in addition, the spiritual merit acquired by them in former births shall go to the person who is prejudiced by their false evidence.[3] This exhortation was intended apparently to frighten the witness about the consequences of false evidence.[4]

The witnesses shall be questioned either before the judicial assembly or on the precincts of the immoveable property in dispute or in the view of the article which is the subject-matter of dispute.[5] In cases of killing, evidence shall be recorded in the presence of the dead body or in its absence in the view of any of its limbs. In all cases the evidence has to be taken in the

[1] Manu, Ch. VIII v. 88; Narada, Ch. IV. v. 199.

[2] Manu, Ch. VIII v. 102.

[3] Yag., Part II. Ch. V. v. 73 to 75.

[4] Narada, Ch. IV. v. 200.

[5] Sm. Ch. page 206.

presence of both parties and never secretly nor should the examination of witness be unnecessarily delayed.[1]

The answers of the witnesses as they are naturally given to the questions shall be taken and they should not be pressed again and again about the same matter.[2] They should relate to the questions asked and should neither exceed the question nor fall short of it, in actions relating to definite tangible property.[3] In other actions such defective statements may be accepted. Any inaccuracy in respect of any of the essential points as to time, place, stature, age, caste, amount of money, etc., is likely to detract from the value of the evidence.[4]

Mode of appreciation of evidence :—When there is a difference between two sets of witnesses, the statement of the larger number shall be accepted. When the number is equal, the statements of persons worthy of credit should be preferred. Among persons worthy of credit those who are superior by virtue of the qualifications enumerated above deserve better credence.[5] Though only a few worthy of credit give evidence it is better than that of a larger

[1] Sukra Neethi, Ch. IV Sub. Sec. V. v. 193.

[2] Mita., page 185; Katyayana and Sm. Ch. page 208.

[3] Narada, Ch. IV v. 232 and 234.

[4] Sm. Ch. page 209 and 210.

[5] Yag. Part II. Ch. V. v. 78.

number, as even a single witness may be preferred as worthy of credit on mutual consent. The disqualifications imposed upon a witness on account of previous contradictory statements is a general one applicable to all witnesses.[1] The appreciation of evidence by demeanour is referred to in Chapter IX in connection with the rules relating to the conduct and demeanour of parties and witnesses.

Rules of proof by witnesses :—A cause is said to have been proved when the witnesses speak to it as true. It is said to fail when they disprove it as false.[2] When the witnesses are unable to prove or disprove a cause owing to lapse of memory, other modes of proof should be resorted to. When one set of witnesses speak to a particular fact, but more trustworthy persons speak to another, the former are said to be perjured witnesses according to the following text of Yagnavalkya :

उक्तेऽपि साक्षिभिस्साक्ष्ये यद्यन्येगुणवत्तमाः ।

द्विगुणावान्यथाब्रयुः कूटास्स्युः पूर्वसाक्षिणः ॥[3]

It might perhaps be doubted whether it is open to a party to adduce more evidence when the first set of witnesses have been

[1] Mita. page 154.

[2] Yag. Part II. Ch. V v. 79.

[3] Yag. Part II. Ch. V v. 80.

examined and he is not satisfied with it. It is no doubt said by Narada that when once the matter has been decided fresh proof cannot be adduced. The explanation for this rule of Narada is simple. The proof of a cause depends upon evidence. If a party unconscious of the defect in the evidence adduced comes to know of it afterwards and thinks it is not good proof what is there to prevent him from adducing fresh proof? For instance, if the evidence of a witness is found to be adverse to the cause, owing to some defect in his organs of sense, though it might not have been discovered before, it may be set right by other evidence. So also false evidence may be tested by other evidence. Katyayana says that the evidence of a witness shall be tested by the Judge and the assembly. The proof becomes clear only when evidence is so tested. The test of true evidence does not consist in its being favourable to one party or another. In the absence of any reason showing the evidence to be false, the cause itself must be held to be false.

The objection therefore, that fresh proof should not be adduced relates only to adducing such proof *after* decision, and not *before*. The text of Narada above cited only refers to such a period. Therefore it is settled that a party is entitled to adduce further evidence when he is not satisfied with the first. But the further

and more satisfactory evidence he proposes to let in must have already been intimated, though not available at that time. Even if the names of witnesses have not been intimated before, they may however be examined in preference to divine proof. In the absence of these, divine proof may be resorted to in the last instance. After this, no further proof can be adduced[1].

This rule is interpreted by some as permitting the defendant to adduce more trustworthy evidence, when he finds the witnesses cited by the plaintiff support the plaintiff's case but Vignaneswara says that this interpretation cannot hold good as the defendant usually has got nothing to prove. The plaintiff is the person who has got something to prove and the defendant is the one who usually denies it and denial does not admit of proof by witnesses. And besides, the burden of proof depends upon the nature of the defence set up. Though the burden of proof is on the defendant in pleas of confession and avoidance and *res judicata* and on the plaintiff in pleas of denial, still according to the rule that there can be only one kind of proof for such action the above interpretation is untenable. Vignaneswara thinks it may be interpreted in a third way. When both plaintiff and defendant claim a certain property as

[1] Mita. p. 156 and 157.

having been got by inheritance without specifying when it was acquired each may adduce evidence of his title. In weighing the evidence on either side the evidence of the defendant may be preferred if it is superior in quality to that adduced on the plaintiff's side. Here there is no proof of denial and it does not offend against the rule of burden of proof varying according to the nature of the pleas. Double proof is no doubt not permissible in a single action but when the action itself is of a double nature such double proof is permissible. He is of opinion that even such an interpretation is opposed to the spirit of the rule enunciated by Yagnavalkya[1]. A similar rule laid down by Katyayana is interpreted by the author of the Smritichandrika as applying to cases of review[2].

Refusal to give evidence.—If a witness having been sworn as above does not answer the questions put for a period of 45 days, he shall be made to pay the entire debt with interest and also 1/10 of that amount in addition. The entire amount of debt shall be paid to the creditor and the king shall take the 1/10th part as fine[3]. According to Manu if the wit-

[1] Mita. page 156 and 157.

[2] Sm. Ch. p. 218 and 219.

[3] Yag. Part II. Ch. V. v. 76.

ness is afflicted by any disease or prevented by any act of God or act of State from giving evidence he shall be allowed 3 fortnights after which he is liable to punishment[1].

If a person being well acquainted with the facts of a case refuses to come and give evidence he shall merit the sin of persons who have given perjured evidence (कूटसाक्षि) and shall receive the same punishment[2]. The decision arrived at in pursuance of tutored evidence is liable to be set aside on review if it is so discovered[3].

Whoever having agreed to give evidence along with others afterwards refuses to give evidence owing to ill-feeling or other cause after the others have deposed, shall be punished with a fine amounting to 8 times the fine to be inflicted on the unsuccessful party[4]. If he is a Brahmana unable to pay his fine, he shall be banished from the country. The banishment shall be preceded by certain acts such as stripping him of his clothes or depriving him of his house, according to the nature of the subject-matter of the action. In the case of others unable to pay such fines, they shall be

[1] Manu Ch. VIII, v. 107, Sm. Ch. p. 212.

[2] Yag. Part II. Ch. V. v. 77.

[3] Manu, Ch. VIII, v. 117.

[4] Yag. Part II, Ch. V. v. 82.

compelled to do the work suitable to their caste or occupation or be put in jail bound in chains. This rule must be observed even in the case of fines inflicted for giving false evidence. When all the witnesses refuse to give evidence all are equally liable to punishment. Katyayana says that persons who make contradictory statements with a view to nullify the effect of their testimony should be punished. A party should not have any secret interview with a witness cited by the adversary and one found doing so with a view to win him over to his side shall lose his case according to Narada[1].

Punishment for false evidence.—The person who procures false evidence by offer of money or other inducements, and the person who gives false evidence accordingly, are both liable to double the punishment inflicted on the defeated suitor[2]. If he is a Brahmana he is to be exiled without any other punishment. This is the ordinary rule applicable when the motive for giving false evidence is not ascertained or when it is not a case of habitually giving false evidence. In the two latter cases Manu lays down the following rule. If the false evidence has been given on account of greed for money, the punishment is a fine of 1000 panams

[1] Mita. page 158; Narada Ch. IV, v. 165.

[2] Yag. Part II, Ch. V, v. 81.

(copper), if it is owing to some misapprehension, the punishment is one laid down for पूर्वसाहस (Poorvasahasa); if owing to fear, punishment of मध्यमसाहस (Madhyamasahasa); if on account of friendship, it is four times that laid down for पूर्वसाहस Poorvasahasa; if on account of lust, it is 10 times that laid down for पूर्वसाहस; if on account of hatred, it is 3 times the punishment for मध्यमसाहस (Madhyamasahasa); if on account of ignorance, it is 200 copper coins; and if on account of youth it is 100. The same punishment is to be observed in the cases of habitually giving false evidence.[1] The three inferior castes are to be punished with fines as aforesaid in addition to corporal punishment. Corporal punishment may take the form of cutting off the lips, cutting off the tongue and loss of life, according to the nature of the false evidence.[2] The Brahmana in addition to fine is liable to be banished from the country, stripped of his clothing or deprived of his house. The different forms of punishment prescribed for the Brahmanas shall vary according to the caste of the parties or the amount involved in the dispute or other circumstances. When the motive for false evidence is not ascertained or when it is a casual instance of false evidence, the Brahmana is

[1] Manu Ch. VIII v. 120 to 122.

[2] Manu Ch. VIII v. 125.

liable only to fine, like a Kshatriya, if the dispute is of a trivial nature. In more serious cases he is liable to banishment. The Brahmana is never liable to corporal punishment.[1]

When false evidence is permissible:— Giving of false evidence as well as refusal to give evidence is always prohibited. There is an exception to this rule which arises in the case of persons who are liable to be condemned to death when a witness shall not speak the truth and may even speak untruth.[2] Where in cases of offences based upon suspicion, speaking truth will entail the death of either party and speaking falsehood will lead to the death of a third party, not giving evidence is permissible if the king allows it. If the king insists on it the evidence should be rendered futile by contradiction. Even if that is not possible, truth alone should be given out, otherwise there is the double sin of giving false evidence and causing the death of another person. One of this is avoided if at least truth is spoken.[3] It is laid down that false statement is permissible in joking, or in relationship with women, in effecting a marriage, in loss of life, and in total deprivation of property.[4]

1 Mita. page 157 and Sm. Ch. page 215.

2 Manu, Ch. VIII v. 104; Yag. Part II Ch. V. v. 83.

3 Mita. page 158.

4 Manu. Ch. VIII. v. 112; Vyasa and Sm. Ch. page 208.

Circumstantial evidence (असाक्षिप्रत्यय).

Narada mentions 6 instances of circumstantial evidence. Possession of a torch in a case of mischief by fire and possession of an instrument in cases of grievous hurt lead to an inference of the commission of crime. A man found dallying with the hair of a woman may be suspected to be guilty of adultery. A person found near a destroyed bridge with a hoe in his hand may be deemed to be liable for such damage. The cutting of a forest may be fixed on a person found emerging from it with an axe in his hand. Presence of injuries may raise an inference of guilt in the person charged with assault.[1] Similarly the possession of stolen property according to Sankha and Likhita is *prima facie* proof of theft. A caution is however added that these appearances of guilt must not be accepted unreservedly without further scrutiny and in the absence of other corroborative facts, as it is pointed out for instance that injuries may sometimes be self-inflicted.[2]

Notes to Chapter VI.

1. Ancient Hindu Law insisted on high moral qualifications in a witness and did not permit of any one being picked up from the streets or from the Court premises and made to

[1] Narada Ch. IV v. 172 to 176.

[2] Sm. Ch. page 221.

depose as is very often done in the modern Indian Courts. This was carried to such an extreme limit that witnesses whose credibility alone would according to modern law be questioned were barred as legally incompetent witnesses though the ancient Hindu legislation kept well in view the modern distinction between an incompetent witness whose testimony is totally shut out and an untrustworthy witness whose testimony though received is disregarded. The tendency of ancient legislation in all countries was to regulate the competency of witnesses by artificial rules of exclusion while the trend of modern jurisprudence is to widen the scope of oral testimony leaving the determination of the credibility to the discretion of the tribunals. The framers of the Indian Evidence Act seem to have stretched this principle to its utmost limits, so that the Indian Act allows evidence which is excluded even under the English Law. The modern Law of Evidence in India is as wide in its range of admissible evidence, as the ancient law was narrow in its compass of competent testimony.

2. Ancient Hindu Law preferred women witnesses in disputes where women were concerned. Though Narada excludes women from the category of competent witnesses on the ground of their natural proneness to lying, still it was recognised that their evidence was likely

to be nearer the truth when other women were concerned.

3. The mode of swearing was adjusted according to the caste of the witnesses, so that the particular form of oath may specially appeal to their imagination and faith, instead of one universal, inflexible rule being applied to all persons irrespective of their intellectual attainments or religious faith, without any kind of stimulus to their moral instincts. It is a common experience in Indian Courts to find a witness who is not habituated to perjury in Courts or used to the tactics of cross-examining counsel to hesitate to answer a question or even to modify his former statement when he is asked to state whether he would positively swear to such and such a fact. It shows that the common illiterate Indian witness is not so alive to the legal consequences of perjury as he is to the moral or religious side of it. The fear that he may meet with some calamity or misfortune in this world or be eternally damned in the next is perhaps more clear to his dim mental vision, than the penalty of fine or imprisonment in jail of which he has no conception until the actual event which may or may not happen. It is perhaps in this aspect of the matter apart from the strong religious belief prevalent in ancient times, that we have to look at the method of proof known as divine proof recognis-

ed in those days as a legitimate legal proof of secular facts. It must be observed by any casual observer acquainted with the administration of justice in this country that perjury has increased considerably within the last century or so. The growing materialistic tendencies of the age, together with the decadence of religious faith may have perhaps contributed to the moral fall of a nation which held up the ideal of Harischandra to the world. The reason for this lapse from ancient ideal may perhaps also be traced to some extent to the entirely foreign legal system which has been introduced into this country. The ancient system of law rested on the foundations of ethics and religion and the method of adducing evidence also had necessarily to tap the ethical and religious instincts of the deponent. This was one important factor in checking perjury.

4. Another feature of the ancient administration was that the judicial assemblies which decided disputes seem to have been held in the very place where the disputes arose or where the crime was committed. Evidence was required to be taken on the very land in dispute. The party or witnesses who wanted to give false evidence had to do it in the presence of his own kith and kin and neighbours who must have known all about the truth of the matter. His perjury would have to face a large body of

public opinion and perhaps incur the risk of social ostracism. This healthy influence of public opinion and possible social ostracism is removed when the Courts are held in distant places and amidst alien surroundings. The party or witness who comes to a big District centre or a Taluk centre does not care a jot as to what the people in and around the Court premises think of his conduct or of his veracity. To an Indian villager the public opinion of his own village is far more important than the severe strictures of the Judge as to his character. The ancient safeguards having been removed, the provisions of the modern law are not sufficiently preventive.

5. The ancient system tended to ensure the production of the best evidence available. It was secured by a process of preliminary elimination of ineligible witnesses and by affording sufficient protection to the respectable witnesses compelled to appear. As in modern procedure, then also the competency of a witness was first decided before the reception of his evidence. But the competency of a witness ranged over a much wider area as stated already and excluded even the testimony of witnesses whose credibility alone can now be questioned. This might have saved the time of the Court in keeping out useless evidence, even at the risk of occasional exclusion of relevant evidence.

6. The respectable treatment which seems to have been accorded to the witnesses in the ancient days was a sufficient inducement to call forth disinterested evidence. It is well admitted by every body acquainted with the working of the present Indian Courts that respectable witnesses try to avoid the witness box. The ancient rule which punished reckless discrediting of testimony stands in striking contrast with the modern law which allows considerable latitude in impeaching the testimony of a witness. This latitude which is perhaps justified in view of the higher interests of justice requires however to be safeguarded with certain limitations. The Indian Evidence Act no doubt clothes the witnesses with certain privileges unknown to ancient jurisprudence but it does not pay sufficient heed to the feelings of a sentimental people like the inhabitants of this country. In other countries where the Bar has been an organic growth along with the development of legal institutions, it has attracted to itself certain traditions and a certain standard of professional etiquette and such environments always afford sufficient guarantee against the abuse of privileges. In India the Bar has been an extraneous importation and its rights and liabilities have to be sought within the four corners of the statute law, apart from any allegiance to professional tradition. The pro-

fessional public opinion, if any, is too often silent and too feeble to assert itself. The party also is more often swayed by spite than by any regard to fairness. Under these circumstances, there is the danger of the liberty allowed to a party degenerating into a license for the reckless harassing of a witness. Modern Indian Law permits any imputation being made with respect to the character of a witness who has entered the witness box with impunity though there is not the slightest basis for it. A respectable witness subjected to such humiliation has to go without a remedy. To a witness regard for his feelings is as important as the result of a suit to a party. The Indian Evidence Act does not go far enough in affording protection to respectable witnesses. There is no reason why modern legislation should not devise some remedy to counteract any tendency to abuse the privilege.

CHAPTER VII.

लेख्यप्रमाण

LEKHYA PRAMANA (DOCUMENTARY EVIDENCE).

Out of the three kinds of मानुषिकप्रमाण (Manushika Pramana) human forms of proof, proof by evidence of possession and of witnesses have been dealt with. There remains the third form of proof by means of documents called Lekhya Pramana (लेख्यप्रमाण).

Lekhya is of two kinds:—(1) राजकीय Rajakeeya (public document); (2) लौकिक or जानपद Laukika or Janapada (private document).[1]

PUBLIC DOCUMENTS.

Public documents may be

1. Shasana (grant) शासन.
2. Jayapatra (judgment or decree) जयपत्र.
3. Âgnapatra (order) आज्ञापत्र.
4. Pragnapatra (request) प्रज्ञापत्र.[2]

Shasana documents relate to gifts of lands or of revenue. The gift of revenue is called निबन्ध Nibandha. In times of conquest or treaty by

[1] Mitakshara, p .159.

[2] Vasishta in Smrithi. Ch. p. 125.

one sovereign with another, it was usual to insist on the grant of lands or revenue. The gift of revenue took the form of a document by which the merchants, agriculturists, and other working classes were directed to make a certain monthly or yearly contribution towards some temple, or charity, or to learned Brahmans. These grants were inscribed on copper plates or tablets with the signature of the person making the gift and the seal and the signature of the king who was responsible for the grant. They contained the conditions and objects of the grant together with the full description of the family, caste, and the names of the grantor and grantee, and the time of the grant.[1] The grants made by the king himself contained his seal and signature alone and the name of the scribe.[2] These documents were required not to give validity to the gift itself which was completed by the acceptance but for securing their permanence.[3]

The next class of public documents was the Jayapatra (judgment or decree). It was awarded not only to the successful claimant for ensuring his rights but also to the defeated party for collecting the prescribed fines. While the term Jayapatra specifies in general all

[1] Smrithi Ch. p. 126.

[2] Vyasa; Smrithi Ch. p. 127.

[3] Smrithi Ch. p. 128.

judgments including those passed on admission, the term पश्चात्कार (Paschathkara) is used by Katyayana with reference to contested judgments. Such Jayapatra contained briefly the allegations of both the parties, the evidence adduced in proof thereof, and the conclusions of the assembly with their reasons, based upon the particular texts of the Smritis governing the case. The opinions of the members of the assembly or of the President, or of the king were required to be written in their own hand.[1] It was granted to the party with the seal of the king affixed. Such public documents bearing the signature and the seal of the king are in themselves proper evidence of the matters to which they relate.[2]

The other two kinds of public documents relate to orders आज्ञा by the king to his servants and tributary chiefs and also requests प्रज्ञा to his spiritual adviser and priest and other venerable persons and independent princes.[3]

PRIVATE DOCUMENTS.

Laukika or private documents were classed either as स्वकृत (Swakrita) written by one self with or without any attestation of witnesses, or अन्यकृत (Anyakrita) written by another and

[1] Vyasa and Brihaspati ; Smrithi Ch. pp. 129 & 130.

[2] Mitakshara, p. 162.

[3] Vasishta in Smrithi Ch. p. 131.

attested by some witnesses.[1] The absence of attestation invalidates the latter.[2] These documents must be written in clear characters and in intelligible language.[3] They must specify the year, month, Paksha (solar half or lunar half), date, the names of the obligor and the obligee and their fathers, their caste and Gotra, and other particulars about the amount lent, rate of interest, and time of repayment, &c.[4] After execution, the obligor shall state at the endabove his signature that it has been executed with his consent. The witnesses also shall sign giving their father's name and stating that they are witnesses to the said transaction. If the executant or the witness is unable to write, he shall get another witness to write for him in the presence of the other witnesses[5]. The writer of the document shall state at the end giving also his description, that it has been written by him with the consent of both parties.[6] Usually every document containing the names of both parties, two witnesses, and the writer is called पञ्चारूढ Pancharoodha (having 5 persons).

[1] Narada, Ch. III. v. 135.

[2] Smrithi Ch. p. 140.

[3] Narada, Ch. III. v. 136.

[4] Yagna., Part II. Ch. VII. v. 84 ; Mitakshara, page 160.

[5] Narada, Smrithi Ch. p. 134.

[6] Yagna Pt. II. Ch. VII. v. 85 to 88.

The witnesses may be two in number or multiples of two according to the usage of the country[1].

There are 8 kinds of private documents according to Vyasa. Including the two kinds of documents above described called Swakrita and Anyakrita, also described as Swahasta and Cheeraka, (स्वहस्त and चीरक), there are ten varieties of them enumerated by Vyasa and Prajapati, *viz.*:

1. Receipt उपगतसंज्ञित (Upagatha).
2. Adhi patra (mortgage) आधिपत्र.
3. Krayapatra (sale) क्रयपत्र.
4. Sthithipatra स्थितिपत्र.
5. Sandhipatra संधिपत्र.
6. Vishudhi patra विशुद्धिपत्र.
7. Vibhagha patra (deed of partition) विभागपत्र.
8. Dana patra (deed of gift) दानपत्र.
9. Dasa patra दासपत्र.
10. Document settling boundary dispute सीमाविवादपत्र.

चीरक (Cheeraka) is the name applied to documents written by recognized document-writers of any place. The Upagatha (receipt) is usually written by the person making the payment and signed by the person receiving it.

[1] Mitakshara, pp. 159 & 160; Smrithi Ch. p. 134.

The Stithipatra is an agreement entered into between merchants, townsmen, and other collection of individuals fixing a certain mode of conduct among themselves. Vishudhi patra was a document awarded to a party who underwent certain purificatory ceremonies for some offences. Dāsapatra (slavery bond) was a bond executed by a man having no food or raiment in a forest to another agreeing to do certain acts[1]. Seemavivadapatra settled boundary disputes and was perhaps in the nature of a plan. The other documents evidencing gift, sale, and mortgage do not call for any description. Partition deed entered into with the consent of all the sharers and attested by witnesses alone is valid. Otherwise even if the father himself executes it, it is not valid. According to Sukraneethi the other private documents relating to gift, sale and purchase of immoveable property also depended for their validity upon the consent of co-sharers and the attestation of the chief men of the village[2].

In all these private transactions, documents are insisted on as placing the matter beyond all doubt whenever future disputes should arise. It follows therefore that a person

[1] Smrithi Ch. pp. 135 & 136.

[2] Sukra Niti Ch. IV. S. V. v. 173 & 174.

receiving a gift should not write the gift deed himself nor should a creditor write the debt bond. On account of their usefulness in terminating future disputes, documents are even permitted to be renewed, whenever necessary[1].

The Swakrita document written by the obligor himself though unattested by witnesses is proper evidence unless it has been brought about by force or fraud or fear or intoxication and such other causes[2]. According to Narada, documents written under such circumstances as well as those executed by women and children are not proper evidence[3]. These invalidating circumstances apply to Anyakrita documents as well.

Non-production of documents:—When the document is not available for settling the future dispute between the parties, it may be renewed with the consent of both parties. It may not be available either because it is kept in a distant country, or because its characters are not legible or the language unintelligible, or because it is lost or because it has become faded, or has been stolen, burnt, mutilated, or torn to pieces[4]. Under these circumstances, it may be

[1] Smrithi Ch. p. 138.
[2] Yagna Pt. II. Ch. VII. v. 89.
[3] Narada Ch. III. v. 137.
[4] Yagna Pt. II. Ch. VII. v. 91.

renewed, if the other party is willing to do it. If not, the party relying on it should be allowed sufficient time to produce it, for the settlement of the dispute[1]. When it is in an inaccessible place, or lost, or destroyed, it may be proved by the evidence of witnesses who have attested it[2].

Determination of the genuineness and validity of documents :—Interpolation of words or sentences as well as other suspicious circumstances may throw doubt on the genuineness of a document. Documents looking fresh though purporting to be old and faded documents though recently executed require scrutiny[3]. Also documents executed in death-bed, or at nights, or by women and children, under some fraud, fear, or force, or under mental distress or unconsciousness are not valid. These disabilities attach also to the writer and the attesting witnesses[4]. Documents written or attested by persons of bad character may be suspected to be spurious[5]. These latent defects and invalidating circumstances must be pointed out by the parties to the Court only before the conclusion of the trial, while the Courts are

[1] Mitakshara p. 162.
[2] Narada Ch. III. v. 142.
[3] Katyana and Hareetha in Smrithi Ch. p. 141.
[4] Brihaspati, Katyayana and Narada.
[5] Katyayana, Smrithi Ch. p. 142.

bound to take notice of the patent defects[1]. These defects if discovered or urged after the termination of the dispute do not detract from the validity of the decision according to Brahaspati. A document is said to be a forged one कूटलेख्य (Koota lekhya) when either the writing of the document or the attestation is denied. If these doubts and defects are cleared up by other satisfactory evidence, then the document is said to be genuine or valid[2]. In cases of disputed genuineness of a document not attested by any witness, it may be proved by comparison of the handwriting of the executant whether he is alive or dead. Also the probabilities inferred from the attendant circumstances of time and place, the resources of the parties, the peculiarities of handwriting, the relationship and state of feeling between the parties may help such decision[3]. The test of comparison of handwriting is prohibited in respect of attested documents where the oral evidence of witnesses would be available. But when all the attestors, the executant, and the writer of the document are dead, such a comparison of handwriting is permitted[4].

[1] Smrithi. Ch. p. 142.
[2] Katyayana.
[3] Yagna Pt. II. Ch. VII. v. 92.
[4] Smrithi. pp. 144 & 145.

The presence of the seal in public documents like judgments and royal grants is sufficient guarantee of their genuineness.[1] The reality of private documents may be tested in the light of enjoyment of the property comprised therein. Disputed debt-bonds may derive some strength either by proof of payment of principal or interest by the debtor or by his previous admission of such execution.[2] Therefore Brihaspati, Katyayana, Vyasa, and Narada warn that too much importance should not be attached to documentary evidence as they are liable to fabrication by clever forgers and dishonest relations. Documents coming from the custody of others who are not parties to them demand close scrutiny and in the absence of satisfactory explanation, may be suspected to be spurious.[3]

The relative probative value of each of these documents in cases of competition between them is also prescribed. As between two self-written documents one with the attestation of witnesses and the other without it, the attested document is better entitled to weight. As between a self-written document and an attested document written by another, the latter commands priority. Public documents override private

[1] Prajapati and Katyayana Smrithi Ch. p. 146.

[2] Smrithi Ch. p. 147.

[3] Smrithi Ch. p. 148.

documents. Even among public documents royal grants have precedence over judgments[1].

But documentary evidence of any kind has decidedly superior probative force over oral evidence[2]. Therefore according to Brahaspati and Katyayana the Courts should exclude all oral evidence which runs counter to the tenor of any document, as otherwise it would open a wide door to fraud and perjury by nullifying the effect of documentary evidence.[3]

Rights enforceable under a document become barred after 30 years even though proof of its execution by witnesses is still available.[4]

Notes to Chapter VII.

It would have been observed in this chapter that no reference is made to testamentary documents. Mr. Mayne says in his Treatise on Hindu Law and Usage (8th edition at p. 551): "It is admitted that the idea of a will is wholly unknown to Hindu Law, and that the native languages do not even possess a word to express the idea." The ancient Hindu Lawgivers seem to have abhorred the idea of a man just before his death disposing of his entire property in favour of strangers or distributing it among his

[1] Smrithi Ch. p. 150.

[2] Samvartha.

[3] Smrithi Ch. p. 151.

[4] Katyayana in Smrithi Ch. pp. 151 & 152.

own kinsmen according to his will and pleasure or his whim and caprice. Brihaspati prohibits the execution of any document while death is impending. They seem to have presumed, what is perhaps true in most cases, that a man just before his death is not likely to have that firm control over his reason or passions which would conduce to a fair distribution of his property. Another reason perhaps was that accumulation of wealth for individual needs or for the support of the family beyond certain limits was discouraged. Wealth, according to the economic basis on which the society rested in those days, was regarded as held in trust for the benefit of the community. The householder was enjoined to earn, not to fatten on luxuries but to supply the wants of the needy and the helpless. The demands of the support of the family had no doubt the first claim on his affection but they were restrained within reasonable limits. Subject to these limits the true import of wealth was understood to facilitate the equal distribution of physical comforts for all and its accumulation in single hands or families was prohibited. At any rate the idea of testamentary disposition is altogether a foreign importation introduced into the country after the British advent. It is still in a nebulous condition and has not taken a definite shape. The people have not assimilated the idea properly

nor has the Legislature interfered to place it on a secure basis as regards those governed by the Hindu Law. In the absence of definite statutory provisions regarding the validity of wills, the plea of an oral will usually set up in Indian Courts is very often a fruitful source of vexatious litigation in India and offers a premium to perjured testimony.

Another noteworthy feature of the ancient method of proof was the prohibition of the comparison of handwriting in respect of attested documents. The modern Law of Evidence contains no such provision though it is well understood that proof by comparison of handwriting is to be resorted to only in the absence of more direct evidence. The modern jurisprudence also recognizes the inconclusive character of such mode of proof but allows its use along with other evidence, with the result that some times Indian Courts are tempted to attach undue importance to the comparison of handwriting and signature. In India where a large proportion of the population is still illiterate it is worthy of consideration how far such an unrestricted use of this kind of proof can be recognized by the Legislature.

CHAPTER VIII.

DIVINE PROOF (DIVYA PRAMANA).

The three kinds of Manushika Pramana (human proof), *viz.*, oral evidence, documentary evidence and possession have been dealt with. There remains the divine form of proof to be considered.

There are five forms of divine proof which are employed in deciding Mahabhiyoga (महाभियोग) disputes. Vyavahara as stated above may be either Tatvabhiyoga or Sankhabhiyoga. Thathvabhiyoga again may relate to serious matters or involve large interests in which case they are called Mahabhiyoga. If the Vyavahara relates to trivial matters it is called Alpabhiyoga (अल्पाभियोग). The five forms are by the use of (1) The Thula (balance), (2) Agni (fire), (3) Apas (water), (4) Visha (poison) and (5) a Kosa (vessel), which will be dealt with more in detail below. There are two other forms which are used in the decision of Alpabhiyoga and Sankhabhiyoga, *viz.*, by the use of Thandula (rice) and Taptha Masha. The Kosa form may also be used for Alpabhiyoga and Sankhabhiyoga. The punishment after resort to such mode of proof falls on the person who fails in his action. Either the Arthee or the Prathyarthee (Plain-

tiff or the Defendant) may by agreement have recourse to such proof. For, as in the case of Manushika Pramana, it is not that only the person on whom the burden of proof lies who can resort to divine proof. Therefore divine proof may be resorted to either by the Arthee (plaintiff) or by the Prathyarthee (defendant) in the pleas of denial of claim (मिथ्योत्तर), confession and avoidance, (Prathyavaskandhana) and (Poorvanyaya), *res judicata*[1].

Though as a general rule, the five forms of Divya Pramana, *viz.*, Thula, etc., are to be employed only in Mahabhiyoga actions, still in cases of suspicion of disloyalty to the king or suspicion of commission of heinous offences, of murder of a Brahman and such other sins, and suspicion of commission of serious thefts, these forms may be employed.[2] The Tandoola form however applies only to cases of suspicion of petty thefts, and Taptha Masha to cases of suspicion of serious thefts[3].

The other forms of vows referred to by Manu have reference to the establishment of truth in minor matters, such as, swearing on truth, vehicle, weapon, cows, grain, and gold

[1] Yagna Pt. II, Ch. VIII v. 95; Mitakshara, pp. 163 & 164.

[2] Yagna Part II, Ch. VIII. v. 96.

[3] Mitakshara, p. 164.

or by touching the head of one's wife, children or friends, as explained by Narada.[1]

These Divya Pramanas and vows may be resorted to in disputes about debts, etc., just as it may be found necessary. Though ordinarily Divya Pramana ought not to be resorted to when Manushika Pramana is available, still in cases of disputes about debts, etc., in addition to Manushika Pramana, Divya Pramana may be invoked by the प्रत्यर्थी (Defendant) for the sake of getting punishment inflicted on the unsuccessful party as the Divya Pramana resting, as it does, upon Divine truth and Dharma, is not subject to any of the infirmities attaching to oral evidence. Under ordinary circumstances Divya Pramana cannot be resorted to for settling disputes about immoveable property. Ofcourse when Manushika Pramana is not available, Divya Pramana may be had recourse to even in cases of disputes about immoveable property.[2]

MODES OF ADMINISTERING DIVYA PRAMANA.

Preparation and time for the same :—The person agreeing to take the Divya Pramana shall keep fast the previous day and bathe with his garment on, early next morning, and go through the Divya Pramana as prescribed, in the presence of the king or the Pradvivaka,

[1] Narada Ch. IV. v. 248 to 250.

[2] Mitakshara, p. 165.

Sabhyas, and Brahmanas. The fast may extend over one night or three nights according to the physical condition of the person observing it and the gravity or otherwise of the matter in dispute. These rules apply to the Pradvivaka also who while observing them himself must enforce the observance of it by the party concerned. Though the rule allows its being done on an early morning, still recognised usage requires it to be gone through on a Sunday. And certain periods of the day are prescribed for particular forms of proof. The Agni and the Ghata and the Kosa forms are to be gone through in the early part of the day while in the mid-day the Jala (water) form is to be employed. The Visha (poison) is to be given only in the night when it is cool. In respect of other forms not particularly specified, they are to be resorted to only in the early part of the day. They should not be gone through in the afternoon, midday, or in twilight. Certain seasons of the year also are prescribed for certain forms and certain seasons are prohibited for certain forms. The Kosa together with the ordinary (Sapathas) vows, Tandula and Tula may be resorted to at all seasons. The Agni form may be applied in the Sisira, Hemantha and Varsha (cold, frosty and rainy months) and Jala form in the month of Sarad and Greeshma (summer and autumn) and the Visha in the seasons of Hemantha and Sisira. In the

months of Chitra, Vaisakha and Margasira (April, May, November and December) also, ordinarily these forms may be resorted to. The Jala form ought not to be resorted to in the cold season extending over Hemantha, Sisira and Varsha; Agni not to be resorted to in the hot season; Visha not to be resorted to in the rainy season; and Thula not to be resorted to in the windy season.[1]

Rules as to forms applicable to certain persons:—Women, children, old persons, blind and lame men, Brahmanas, sick persons, may take to the Thula form, Kshathriyas to the Agni form, Vaisyas to the Jala form, and Sudras to the Visha of seven grains.[2] The rule prohibiting women altogether from resorting to Divya Pramana applies to cases where only one of the parties to the Vyavahara is a woman. In such cases the adversary alone can resort to it. If however both parties are women the rule applies, in which case only the Tula form may be ordinarily employed. Also in cases against women of suspicion of heinous offences the Tula form applies. The Visha and the Jala forms also are prohibited in the case of women and children. The Thula form is prescribed only as a general rule in the case of women and Brahmanas and not as an invariable rule. In

[1] Mitakshara, pp. 165 & 166.

[2] Yagna Pt. II Ch. VIII. v. 98.

the case of a Brahman, excepting the Visha, the other forms also may be employed. In the case of some persons suffering from particular diseases certain forms are to be avoided. Leprous people may avoid the Agni form and asthmatic people the Jala form, and persons suffering from bile and phlegm may avoid the Visha form. Weak people may avoid the Jala, Agni, and Visha forms. Finally the form to be employed will depend, like the rule as to seasons, also upon caste, age, and health of the persons seeking to take such mode of proof.[1] It has been stated before that the four forms of Divya Pramana (Agni, Jala, Visha and Thula) are to be employed only in Mahabhiyoga actions. If the value of the action exceeds 1000 panas (copper) they are called Mahabhiyoga actions.[2] The saying of Pitamaha to the effect that in actions of the value of 1000 panams, the ghata is to be given; in actions of half the value (500), fire; and in actions of half of that value (250) water; and in actions of the half of the latter (125), poison, has reference to cases of disputes about money when the misappropriation amounts to grave sin. In cases of denial of gift and in cases of theft and assault though the value of the objects in dispute be small, Divya Pramana may be resorted to according

[1] Mitakshara, p. 165 & 166.

[2] Yagna Pt. II. Ch. VIII. v. 99.

to (Katyayana). Katyayana says that the king shall ascertain the value of the subject-matter of the dispute in gold and decide the form of Divya Pramana accordingly. If 100 suvarnas, Visha shall be given; if 80, Agni; if 60, Jala; if 24, Ghata; if 10 or 20, Kosha; if 5 or half of it, Tandula; if half of 2½, the head of the son shall be touched. If half of 1¼, other ordinary worldly vows are prescribed.[1]

The rule that the application of these four forms of Divya Pramana is dependent upon the value of the action exceeding 1000 panas, does not apply to the offence of treason and other grave offences. In the case of persons accused of heinous sins (Mahapataka) the Tula is to be placed in the temple; in the case of persons accused of treason, in front of the palace; in the case of low born, in the crossing of the four streets; and in the case of others, in the hall of the judicial assembly.

The modes of taking various forms: Tula form:—A Tula (balance) of certain dimensions and certain description shall be made. It shall be worshipped by invoking the presiding deities and offering worship to them. The Pradvivaka should address it as follows: "Oh God Dharma, enter this Divya Pramana with the Lokapalas, and the Vasus, Adityas, and Marutganas." There shall be various flowers, incense, and food

[1] Mitakshara, p. 166.

offered to these deities. Then the matter in dispute shall be written on a piece of paper. This paper shall be placed on the head of the person taking this Pramana with this Manthra:

आदित्यचन्द्रावनिलोनलश्च द्यौर्भूमिरापो हृदयं यमश्च ।
अहश्चरात्रिश्च उभेचसन्ध्ये धर्मश्चजानाति नरस्यवृत्तं ॥

These foregoing rules apply to all forms. The Pradvivaka shall address the following special Manthras in the respective special forms: In the case of Tula, he shall say:—

त्वंघटब्रह्मणासृष्टः परीक्षार्थं दुरात्मनाम् ।
धकाराद्धर्ममूर्तिस्त्वं टकारात्कुटिलं नरं ॥
धृतोभावयसे यस्माद्धटस्तेनाभिधीयसे ।
त्वंवेत्सि सर्वजन्तूनां पापानि सुकृतानिच ॥
त्वमेव देवजानीषे न विदुर्यानि मानवाः ।
व्यवहाराभिशस्तोऽयं मानुषः शुद्धिमिच्छति ।
तदेनं संशयादस्माद्धर्मतस्त्रातु मर्हसि ॥

The person undergoing this Pramana shall get himself weighed in the balance with mud, bricks, or wood in the other scale until the scales are even, and mark the scale with some chalk. Then he shall get down and repeat the following Manthra[1] :—

त्वं तुले सत्यधामासि पुरा देवैर्विनिर्मिता ।
तत्सत्यं वद कल्याणि संशयान्मां विमोचय ॥
यद्यस्मि पापकृन् मात स्ततो मां त्वमधो नय ।
शुद्धश्चेद्गमयोर्ध्वं मां तुलामित्यभिमन्त्रयेत् ॥

[1] Yagna. Pt. II. Ch. VIII. v. 101 & 102.

The Pradvivaka shall then place the paper again on the head of the person and weigh him for some time in the presence of persons who know how to weigh. If the scale goes down or is equal, he shall be considered guilty. If it goes above, he shall be deemed innocent. If it goes down, the offence is considered very serious. If it remains equal, it shall be considered slight. The persons selected to decide this weighing shall report to the king who should act on it.[1]

Agni Pramana (Ordeal by Fire):—The common rules laid down as stated above apply to all the ordeals. The following are particular rules to be observed in the ordeal by fire. The hands of the person undergoing this ordeal are rubbed with rice and seven Pippal leaves are put in both the hands folded after marking any scars or wounds in them with Alaka juice. Both the hands are tied with seven white threads.[2] Then seven leaves of Shamee tree and seven blades of grass together with coloured rice and flowers are put over the Pippal leaves. In the absence of Pippal leaves Asoka leaves may be substituted.

The Pradvivaka should make 108 offerings of ghee in ordinary fire kept on the southern side of the circle made for the ordeal and have the piece of iron heated three times in the

[1] Mitakshara, pp. 168 & 170.

[2] Yagna. Pt. II Ch. VIII. v. 103.

fire. The first two times it is heated, it shall be dipped in water. The Pradvivaka shall utter the following Manthras to the piece of iron heated for the third time.

त्वमग्ने वेदाश्चत्वारस्त्वं च यज्ञेषु हूयसे ।
त्वं मुखं सर्वदेवानां त्वं मुखं ब्रह्मवादिनां ॥
जटरस्थो हि भूतानां ततो वेत्सि शुभाशुभम् ।
पापं पुनासि वै यस्मात्तस्मात्पावक उच्यसे ॥
पापेषु दर्शयात्मानं अर्चिष्मान् भव पावक ।
अथवाशुद्धभावेषु शीतो भव हुताशन ॥
त्वमग्ने सर्वभूतानां अन्तश्चरसि साक्षिवत् ।
त्वमेव देवजानीषे न विदुर्यानि मानवाः ॥
व्यवहाराभि शस्तोऽयं मानुषः शुद्धिमिच्छति ।
तदेनं संशयादस्माद्धर्मतस्त्रातुमर्हसि ॥

Oh Agni, Thou art the four Vedas and sacrifices are offered to thee. Thou art the mouth-piece of all the Gods and of all who teach Brahma. Thou living in the stomach of all beings knowest right and wrong. As thou purifiest sins, thou art called Pavaka (Purifier). Show thyself as the consumer in sinful beings and become cold in pure beings. Thou movest in the hearts of all Devas and witnesseth all things, Thou alone knowest things which men cannot discern. This man being impleaded in an action seeks thy purification to vindicate himself. Protect him therefore from this cloud on his character.

After this preparation, the person seeking the ordeal shall utter the following manthra :—

त्वमग्ने सर्वभूतानामन्तश्चरासि पावक ।
साक्षिवत्पुण्य पापेभ्यो ब्रूहिसत्यं कवेमम ॥[1]

Oh Agni, Thou movest in the innermost hearts of all beings and purifiest all things. Endowed with keen insight, Thou canst like a witness speak out truth between right and wrong.

In his hands shall be placed a ball of red-hot iron of 8 inches diameter weighing 50 palams.[2] He shall go slowly seven rounds in a circle with this iron in his hands. The first circle shall be of sixteen inches diameter.[3] The remaining 7 circles shall be concentric each being 16 inches away from the other. Standing on the 8th circle after completing his 7 rounds, he shall throw the iron piece on the 9th circle and rub his hands with rice. If he is pure, his hands shall remain unburnt. If the ball falls down in the meanwhile or if there is any further doubt, he shall undergo the same ordeal once over again[4]. The rules as to the fasting, bathing, and tying up the paper containing

[1] Yagna. Pt. II. Ch. VIII. v. 104.
[2] Yagna. Pt. II. Ch. VIII v. 105.
[3] Yagna. Pt. II. Ch. VIII v. 106.
[4] Yagna. Pt. II. Ch. VIII. v. 107.

the subject-matter of the dispute on the head apply to this ordeal also.[1]

Ordeal by water :—Having performed the preliminary rights prescribed for all these ordeals, the Pradvivaka shall utter some Manthras invoking God Varuna as the purifier of all men and things. The person undergoing the ordeal shall then stand facing the east in navel-deep water holding a stick of sacrificial wood and invoke God Varuna to establish his innocence, whereupon his thighs shall be dragged in water. It may be done in slow running rivers, in the sea, in ponds, and tanks. Shallow water and places where there are crocodiles and weeds and mire shall be avoided. It cannot be done in any receptacle containing water. After this, two agile persons should stand one at the place where a *Torana* is fixed and wherefrom three arrows are shot and another at the place where the middle of the three arrows has fallen. As soon as the person undergoing the ordeal plunges in water, the first person shall run up to the second. On the former reaching the place where the arrow has fallen, the second shall run back with the arrow to the place where the person had plunged in water and if he sees him still completely plunged in water, the subject of the ordeal shall be declared innocent. If he be found

[1] Mitakshara, pp. 171 to 173.

floating on the top, he shall be found guilty. If any portion of the body such as the ear or nose be visible on the surface or if he shall have moved from that place to another, the ordeal shall not be deemed successful. The running and plunging shall commence simultaneously as soon as the Pradvivaka claps his hand thrice.[1]

Ordeal by poison: (*Vishavidhi*):—The Pradvivaka shall after undergoing the preliminary rites administer the poison to the person undergoing the ordeal. The person shall stand facing south and, having uttered the Manthras invoking the God of poison to purify him, shall take poison of the Himalayan regions. If the poison does not produce any of its ordinary effects in his body, at the end of the prescribed time, he shall be declared pure. The time limit is 500 beats with the hand or the end of the day. Afterwards he may be treated with antidotes for poison. The quantity of poison and the time of day and season in which it ought to be given are also prescribed[2].

Ordeal by drinking water : (*Kosa Vidhi*) :—After observing the ceremonies prescribed in general for all these ordeals, the Pradvivaka shall perform the pooja of some fierce deities

[1] Yagna. Pt. II. Ch. VIII. v. 108 & 109. Mitakshara, pp. 174 & 175.

[2] Yagna. Pt. II. Ch. VIII. v. 110 & 111. Mitakshara, pp. 176 & 177.

and bathe them with water and address some Manthras to the holy water. The person undergoing the ordeal shall take that water in a separate vessel and pray to it that he might be vindicated and drink three handfuls of that water, standing in a place where a (Mandalam) circle has been made facing the sun. If within 14 days of taking such water, he is not visited with any trouble either inflicted by the king or through the agency of the deities, he shall be declared pure[1]. This rule applies only to *Mahabhiyoga*. In other cases also Kosavidhi is permitted and in such cases, the periods of 3 days, 7 days, and a fortnight are fixed. Rules are laid down in respect of (1) the deities to be worshipped (2) the nature of the action where it is to be administered, and (3) the persons who may undergo it. As a general rule, the deity to whom he is devoted shall be worshipped. In other cases, the sun shall be worshipped by making a Mandalam on the ground worshipped. In the case of thieves and of persons who live by using their instruments, Goddess Durga shall be worshipped through her *Soola*. The other deities also are to be worshipped through their particular Ayudam (instruments). This ordeal may be resorted to in actions resulting out of breach of trust and suspicious acts and in

[1] Yagna. Pt. II. Ch. VIII. v. 112 & 113.

all cases where the guilt is suspected. It is to be given to a person who believes in God and who is not afflicted with any other mental worry and who has fasted the previous day and who has bathed and is wearing wet cloth. This should not be administered to persons who are addicted to drink or sexual immorality and who are swindlers. It is to be avoided in the case of serious offences or persons who do not follow the rules of caste, who are low born, and in the case of degenerate persons and slaves.

These are the 5 kinds of ordeals ordained by Yagnavalkya as applicable to Mahabhiyoga forms of action. There are two other ordeals laid down by other writers (Pitamaha) as applicable to other minor kinds of Abhiyogha, *viz.*, Tandoola Vidhi तण्डुलविधि and Thapthamasha Vidhi तप्तमाषविधि. Tandoola Vidhi is usually applied to thieves. It consists of eating rice. The rice shall be cleaned and kept mixed with water in a mud pot in the sun. The person undergoing the ordeal shall fast the previous day and after bathing the next day shall stand with his face eastwards with the document specifying the nature of the act charged, on his head, and eat the rice and sit upon a plank made of the holy fig tree or the birch tree. If his chin does not thereafter become red or his palate does not get parched, or his body does not tremble, he shall be declared pure.

Thapthamasha Vidhi :—A circular cup of 4 inches depth shall be filled with 20 palams of ghee or oil and heated and therein a rod sixteen inches long made of gold, silver, or iron shall be put. It shall be picked up by the thumb and forefinger by the person undergoing the ordeal and if his fore arm does not shiver or does not get scalded, he shall be declared pure.

Another form of this is as follows :—Ghee of cow's milk shall be boiled in a metallic vessel or earthen pot and a copper ring shall be put into it and taken out by the person going through the ordeal. If his fingers are not scalded, he shall be regarded pure.

Dharma—Adharma Vidhi :—Two balls of silver or iron or lead shall be made. The silver ball shall represent Dharma and the other shall represent Adharma, and they shall be placed in two vessels and closed. The person undergoing the ordeal shall be asked to pick out one of them and he shall be declared pure or otherwise just as he may pick out Dharma or Adharma.

The other forms of ordeals (Sapathas) referred to by Manu and others relate to actions involving small sums or to some particular castes. Ordinary oath is prescribed where the subject matter of the claim is one Nishka and oath by touching the feet when it is 2 Nishkas, and oath by foregoing *Punyam* when it is 3 Nishkas and the ordeal of drinking water, if

it exceeds these. Oath is administered to a Brahmana by asking him to speak the truth, to Kshatriya by his weapons and vehicles, Vaisya by his gold, cattle and grain, and Sudra by invoking all sins. The person undergoing any of these shall be declared pure, if he does not come by any harm within a certain fixed time.

The person undergoing all these ordeals and declared pure shall be awarded half the subject-matter of the claim and the other guilty party shall be punished. Seven kinds of punishment are mentioned for the 7 ordeals, for poison 1000 panams, for water 600, for fire 500, for Tula 400, for Kosa 300, for Tandula 200, and for Taptha Masha 100. This punishment is to be in addition to that laid down for the unsuccessful party[1].

Notes to Chapter VIII.

The rules framed for divine proof of secular facts need cause no amusement in modern days. It is no doubt a relic of the primitive forms of legal remedies. From early times some supernatural method of deciding a dispute otherwise than on strictly legal forms of procedure has been recognized both in the East and the West. The Greeks and the ancient Teutons preserved the Aryan institution of ordeal. *Vide* Ihering's

[1] Mitakshara, pp. 178 & 179.

"Evolution of the Aryan," p. 13. In the western countries it took latterly the form of ordeal by combat. India agreeably to its religious instinct invented these divine ordeals so that what was sought to be decided in the West by appeal to brute force was decided in the East by a more rational appeal to the moral and spiritual force through the supposed intervention of divine agency. In England even so recently as 1819 a trial for murder is recorded as having been decided upon such wager of battle (see the report in Barnewall and Alderson's Reports, Vol. I, p. 405 cited in Dr. Markby's Elements of Law, page 17). The ordeal by Divine Proof was prevalant in India even during the time of the East India Company. The various kinds of oaths by which suits are even now adjudged in the Indian Courts bear ample testimony to the strong religious faith of the common people even in modern times. The Indian Oaths Act has sanctioned the adjudication of disputes on oaths or affirmations in any form common amongst, or held binding by, persons of the race or persuasion to which the party challenged belongs and which is not repugnant to justice or decency. The latter restriction would now exclude the various divine ordeals recognized in olden days. Whatever may be the standpoint from which they may be looked at now, there can be no doubt that in ancient

times it successfully checked perjury and restrained false claims. Hieun Tsang the famous Chinese traveller who was perhaps an eye-witness to some of these ordeals describes them with approval in his Travels and says that they were regarded then as "efficient instruments for the ascertainment of truth."

CHAPTER IX.

संशयहेतुपरामर्श

SAMSAYA HETHU PARAMARASA
SOME PRINCIPLES OF ADJUDICATION.

It is the duty of the king to find out the truth of a case avoiding all mistakes and detecting all frauds[1]. The king shall endeavour to afford full opportunity to the parties to furnish proof of their claim having due regard to the difficulties caused by the act of God or of the king. Undue importance cannot be attached to any of the various kinds of proofs above referred to, as each may be affected by some infirmity peculiar to it. The oral evidence is likely to be tainted by perjury; the documentary evidence may be vitiated by forgery; the proof by enjoyment may be deceptive inasmuch as possession may have had an unlawful origin.[2] The President and the assembly shall endeavour always to induce the parties to speak out the truth in which case evidence may even be dispensed with. The best proof is the discovery of truth from the admissions of parties; in its absence, resort to other proofs becomes neces-

[1] Yagna, II. v. 19.

[2] Sukra Niti. Ch. IV. S. V v. 209 & 215.

sary[1]. If a man is able to prove his right only to some of the many things claimed, which have been totally denied by the adversary he shall be entitled to all the things, subject however to the exception that his right in respect of any thing not claimed before shall not be allowed[2]. This rule is based upon the presumption that the defendant who has denied the right in respect of all and whose plea has been found to be untrue in respect of some, cannot be believed in respect of the rest and also upon the converse presumption that the plaintiff must be believed as speaking the truth. Though the claim in respect of the rest not proved may not be true, it is no error of the Judge[3]. Vignaneswara accepts this rule laid down by Yagnavalkya as being in accordance with natural presumption and logic, though Katyayana may be thought to be of a different opinion. He interprets the text of Katyayana to the effect that in the case of various claims only those actually proved can be allowed as referring to the claim against the son of the deceased person who usually pleads ignorance of the claim. This view is combated by the author of Smrithi Chandrika. However, there is another text of Katyayana to the effect that the claim cannot be allowed, when the proof

[1] Mita, p. 120.

[2] Yagna, p. II. Ch. II. v. 20.

[3] Mita, p. 121.

adduced does not cover the whole claim or is in excess of it. But even according to Katyayana, in cases of offences against life, साहस (violence), theft, and offences against women, proof of a part of the claim amounts to proof of the whole.

The conduct of parties and demeanour of witnesses play an important part in determining the truth of a claim. The following demeanour discernible in the facial and mental expression, words, and bodily movements, and actions (मनोवाक्कायकर्म) not due to fear, is considered bad as throwing suspicion on the veracity of statements of witnesses and parties. The action is not however liable to be rejected on that ground alone. The conduct of the party also may discredit his claim. Omission to examine witnesses cited or mentioning witnesses not cited before, and inconsistent statements, or a desire to evade enquiry may tend to negative the truth of his claim.

Facial expression is denoted by the sweating of the brow or by some facial change. If a man talks indistinctly or haltingly or incoherently or if he is too voluble it is considered bad. Acts of bodily movement from place to place or touching the lip with the tongue are taken to be another infirmative circumstance in weighing the evidence. Not returning one's gaze or not answering the question put shows the mental

attitude of evasion.[1] Whoever being in a position to get from the adversary the object for which he might have sued but which has been surrendered by the adversary, sues again for the same, or whoever after confessing judgment or after the claim is proved against him, absconds, or whoever being summoned before the King does not answer the claim shall not only lose the action but also be punished.[2]

Conflict of Laws.—Some rules are laid down for guidance in cases of conflict of laws. Narada declares that justice should be administered in accordance with Dharma Sastra and Artha Sastra. Artha Sastra is used here not in the restricted sense of the science of wealth but in the general sense of the science of polity which is comprised in the Dharma Sastra itself. Dharma Sastra includes the four Vedas and their Angas, the Smritis, Meemamsa and the Puranas.[3] When there is conflict between Dharma Sastra and Artha Sastra (science of wealth) strictly so called, the former should be followed. According to Kautilya's Artha Sastra "Sacred Law (Dharma), evidence (Vyavahara), history (Charitra) and edicts of kings (Rajasasana) are the four legs of law."[4] When the Sacred Law

[1] Yagna., Pt. II. Ch. II. v. 13 to 15.

[2] Mitakshara, p. 119.

[3] Smrithi Ch. p. 54.

[4] Mr. Shama Sastri's Artha Sastra, p. 191.

conflicts with evidence or conduct (Charitra which is translated as history) the sacred law must govern the decision but the sacred law itself is however subordinate to the final rational law of the king (Dharmanyaya) based upon equity.[1] Where the Smritis which form the Dharma Sastra conflict, recourse is to be had to the principles of justice and equity (न्याय Nyaya).[2] Brihaspathi suggests that all the rules of Dharma Sastra should even in the absence of conflict be tested in the light of these principles. They are however to be deduced not arbitrarily but from precedents by the process of deductive reasoning.[3] The precedents must be taken to serve only as illustrations, the matter in dispute being decided essentially on its own merits. When the written law and usage are not in agreement, the written law must be followed. In the absence of written law usage has precedence, provided it is not inconsistent with any written law. Such usage to be valid must have been observed by the people of any country from time immemorial. Such usages should be recorded by the king and stamped with his seal.[4] In the absence of any particular usage the word of

[1] Narada, Ch. I. v. 10.

[2] Yagna. Pt. II. Ch. II. v. 21.

[3] Smrithi Ch. p. 54; Mitakshara, p. 122.

[4] Katyayana.

the king terminates the dispute.[1] Therefore it follows that the decision of any dispute depends primarily on the Dharma or law as enunciated in the Smritis, and in the absence of such written law, on usage, and finally in the absence of the usage on the command of the king.

The judicial assembly determined on which party lay the burden of proof.[2] Proof was to be confined to the facts originally alleged. Any attempt at proof of irrelevant facts led not only to the loss of the original action but was also visited with fine. Similarly default in appearance of either party resulted in the rejection of his case.[3] Any party who failed to examine his witnesses even after taking time therefor was non-suited.[4]

Any party who fraudulently failed to prosecute the case after the commencement of the trial was punished with twice the fine inflicted on the unsucessful party though in some cases compromise with the permission of the king was permitted.[5] Compromise was recommended in cases where the evidence was equally balanced or where the law came in conflict with usage.[6]

[1] Pitamaha.
[2] Brihaspati and Katyayana; Smriti Ch. p. 113.
[3] Smriti Ch. p. 107.
[4] Brihaspati and Katyayana.
[5] Brihaspathi, Smriti Ch. p. 112.
[6] Smriti Ch. p. 113.

If the alleged title of the plaintiff has been displaced by proof of superior title in the defendant, the former can adduce evidence of his enjoyment to defeat the title of the latter.[1] When there is valid proof on both sides, in the absence of any other factor determining their relative merits, the subsequent act उत्तरक्रिया proved in all actions relating to property succeeds, while in actions relating to pledge, gift and sale the prior act succeeds.[2]

Example 1 : On a man proving his adversary's possession by previous seizure, if the adversary proves its subsequent return, the act of return must be accepted as true and the adversary succeeds.

Example 2 : If a man having first pledged his land to another, somehow gets it wrongfully and again pledges to successive persons, the first act of pledge alone is valid. Similarly in cases of gift and sale. Though having first parted with ownership in the thing, he cannot legally pledge, give or sell again, still it is enunciated as a rule of evidence.[3]

Witnesses have to be examined by those on whom the burden of proof lies. When the bur-

[1] Yagna. Pt. II. Ch. II. v. 17 ; Narada Ch. IV. v. 163.
[2] Yagna. Pt. II Ch. II. v. 23.
[3] Mitakshara, p. 124.

den has been satisfactorily discharged the witnesses cited by the other party need not be examined. But in pleas of confession and avoidance the party alleging a subsequent act has to prove it. In the absence of any proof the decision of the king terminates the dispute.[1]

Notes to Chapter IX.

It is interesting to notice the limited scope which precedents were given in adjudications in ancient days. Precedents were understood even then to illustrate the existing law and not to create new laws. While judge-made law is the essential feature of the English system, codified law alone has been chiefly invoked in India from the earliest times for decision. The tendency has however grown up in Indian Courts of late to import the decisions of foreign Courts into their reasoning and to twist the codified law of India in accordance with the standards of propriety and justice prevailing elsewhere. Their Lordships of the Privy Council have more than once noticed this with disapproval. They say in the course of a judgment reported I. L. R. 45 Calcutta page 878 at page 904 "Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring largely to

[1] Pitamaha and Vyasa Smriti, Ch. p. 123.

foreign decisions. However useful in their scientific study of jurisprudence, judgments of foreign Courts to which Indian practitioners cannot be expected to have access based often on considerations and conditions totally differing from those applicable to or prevailing in India, are only likely to confuse the administration of justice."

CHAPTER X.

JUDGMENT AND DECREE, निर्णय (NIRNAYA)

When the evidence in any one of the ways above stated has been adduced and the assembly has weighed it in the light of the principles laid down in the previous chapter, it shall reduce its conclusion to writing in the form of a judgment. These judgments called निर्णयपत्र (Nirnaya Patra) must narrate the matters in dispute together with the proof adduced thereon and the reasons for the conclusion. They must bear the signature of the Pradvivaka (President) and the other members of the assembly (Sabhyas) and the seal of the king. Each of the Sabhyas must signify his assent to the final verdict and sign his name with full description of himself. For a dispute becomes finally settled only when it has the full consent of the Sabhyas. These judgments awarded to the successful party are called Jayapathras (जयपत्र) and Heenapathras (हीनपत्र) are those given to the unsuccessful party. The former are necessary for proving the Poorva Nyaya (res judicata) in course of time, while the latter are required for inflicting fine on the unsuccessful party.

The party who having admitted the claim

of the adversary refuses to satisfy it shall be compelled to pay a fine of one-twentieth of the amount to the king in addition to payment of the amount claimed to the successful party. But where admission is followed by prompt payment no fine is inflicted. In cases of disputed claims Vishnu makes the successful party pay one-twentieth part of the amount as remuneration to the king while the defeated suitor pays one-tenth of the amount as fine. Manu prescribes a fine of double the amount payable in cases where the claim denied is allowed or the amount claimed is disallowed. This is in accordance with the principle of Narada that false assertion of a non-existent claim is equally punishable with the false denial of a truthful claim. Yagnavalkya fixes a fine equal to the amount of the claim where in spite of total denial it is upheld and a fine of double the amount where the whole claim is negatived as false.[1] But Vyasa reduces the fine in either case to half the amount of the claim. Manu permits the fine of one-tenth of the amount to be reduced according to the circumstances of each case. Vignaneswara interprets the rule as to fine of double the amount as restricted to cases of debts, while the fine equal to the amount of the claim applies generally to all actions, as

[1] Yag. Part II. Ch. II. v. 11.

various kinds of fine are specially mentioned for actions relating to debts, bailments, and pledge.

Whoever is found to have misappropriated the money or property of others by reason of long enjoyment shall be made to restore it to the owner and shall also be liable to pay an equal amount to the king as fine.[1] In respect of disputes about immoveable property, the amount of fine shall be the same as the one levied for destruction of boundaries or encroachment. If the fine so prescribed is inadequate in proportion to the wealth of the offender then such amount as the President and the assembly may fix shall be levied. In cases of inability to pay the fine, the punishment was commuted to either imprisonment or manual labour.[2]

In addition to the ordinary fines so imposed for failure of proof, special fines were levied where the defeat of either party was judged by Divya Pramana. The fine varied with the form of Divya Pramana taken as stated already.

In actions accompanied by deposit of money (Sapana Vyvahara) the deposit of the unsuccessful party was forfeited while the fine also was levied from him.[3]

1 Yag., Part II. Ch. II. v. 26.

2 Katyayana and Mita. page 127.

3 Yag. Part II. Ch. II. v. 18.

The original owner whose title has been questioned, if he fails to prove it, shall be punished but not his son or son's son. In the case of the son, he is bound to prove possession though without title and if he fails to prove it he shall be punished. The grandson who fails to prove the fact of inheritance from generation to generation shall be punished. The punishment is to be inflicted in addition to the dismissal of the claim.[1]

An exception to the rule that immemorial enjoyment without knowledge of original title is proof of title arises in the case of a man who died before termination of the dispute. In that case the son must prove title and it will not avail him if he merely proves possession by means of witnesses, as the previous enjoyment becomes tainted having been questioned in the prior proceeding.[2] This is also the view of Narada.[3]

Execution.

The subject-matter of the suit was restored to the successful party with damages for its wrongful detention. Sometimes the President and the members of the assembly chose two persons as sureties, one for each party, who

1 Yag. Part II. Ch. II. v. 28; Mita. page 130.

2 Yag. Part II. Ch. II. v. 29.

3 Narada, Ch. IV. v. 93.

should see to the execution of the decree that may eventually be passed.[1] In the absence of such persons offered by either party, the assembly may appoint men of their own choice who shall be paid their wages for each day by the parties.[2]

[1] Yag. Part II. Ch. II. v. 10.

[2] Mita. page 117.

INDEX.

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